No. 011099 JAN 22 2002

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In The

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties, HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION, MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that it lacks specificity when this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), suggests a district court faced with such a situation should either require a reply or a more definite statement, and, further whether such action by the district court violates the Due Process Clause of the Fifth Amendment, which guarantees notice and an opportunity to be heard? Divergent circuit views on whether *Crawford-El* permits or precludes a heightened pleading standard in civil rights cases involving individual defendants make this issue ripe for this Court's consideration.

2. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground it lacks specificity without granting Plaintiff an opportunity to amend.

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The decision of the United States Court of Appeals of which Petitioner seeks review is reported as *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). The opinion also appears in the Appendix to this Petition at App. 1a. The decision of the district court is not reported and appears at App. 11a. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. Aug. 21, 2000). The district court adopted the Report and Recommendation of the Magistrate Judge, issued two months earlier. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. June 20, 2000). App. 14a.

STATEMENT OF JURISDICTION

Plaintiff Michael Erikson filed the present lawsuit under 42 U.S.C. § 1983, a federal civil rights statute. Jurisdiction was conferred by section 1983 and by 28 U.S.C. §§ 1331 and 1332. Mr. Erikson appealed the dismissal of his suit to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed the dismissal by an Opinion issued August 23, 2001. *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). Mr. Erikson did not file a Petition for Rehearing. Mr. Erikson then sought review by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254 and Supreme Court Rules 12 and 13.

He timely files the Petition pursuant to an extension of time granted by this Court on November 13, 2001.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The **Fourth Amendment** of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The **Fifth Amendment** of the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V (emphasis added).

Section 1983 of Title 42 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12(b)(6) states as follows:

> **(b). How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Mr. Erikson seeks review of a decision of the United States Court of Appeals for the Tenth Circuit in which the court affirmed the dismissal of his civil rights case, brought under 42 U.S.C. § 1983. *Erikson v. Pawnee County*

was he ever informed as to whom had accused him of making such a threat (App. 81a).

The legitimacy of Morganite's allegations that Mr. Gibbs threatened some unidentified person were complicated further by the testimony offered by Doug Blizzard before the North Carolina Employment Security Commission on September 19, 1997, some six months after Mr. Gibbs had been terminated. At that hearing, Mr. Blizzard testified that Mr. Gibbs had threaten Mr. Bone during the January 4th incident, (App. 78a), while another supervisor, Russell Lee, believed that it was Mr. Glenn Knight who was threatened by Mr. Gibbs. (App. 75a). Interesting enough, Mr. Cooper, the second line supervisor, testified in his deposition that Mr. Bone never informed him that Mr. Gibbs had threatened him. (App. 92a). When Mr. Blizzard was confronted with these inconsistencies in Morganite's claims as to whom Mr. Gibbs allegedly threatened, Mr. Blizzard admitted that "*apparently* some other employees came out of the woodwork for whatever reason and made comments. . ." about Mr. Gibbs. (App. 78a).

Mr. Blizzard also admitted that neither he nor any other management official for Morganite conducted any type of investigation in order to determine whether a threat had in fact been communicated. (App. 79a). Despite Mr. Gibbs denial that he threatened anyone, he was disciplined for the alleged threats of January 4, 1996.

The findings by the court inferred that prior to Mr. Gibbs' termination, he had been counseled by Morganite for his threatening behavior. The implication from this finding was that Morganite had counseled Mr. Gibbs for the threats he allegedly made on January 4th as well

as counseled him on other occasions for the same conduct.

Contrary to this finding, Morganite never informed Mr. Gibbs who it was he allegedly threatened nor was he informed when the alleged misconduct supposedly occurred on January 4th. On that occasion, Mr. Gibbs was subjected to disciplinary action without any means to challenge the allegations that he contended were fabricated. He was required to submit to a psychiatric evaluation which discredited Morganite's claim that Mr. Gibbs was a threat. During his employment with Morganite, there was never another instance where Morganite brought to Mr. Gibbs attention an issue about him threatening any employee.

As part of the discipline for the January 4th incident, Mr. Gibbs was also required to enter into a last chance agreement which required that he be subjected to personal searches. Mr. Gibbs signed this agreement, but included a three page addendum which outlined his written protest of his working conditions. This written protest pointed out that he had been subjected to a continuous atmosphere of racial discrimination at Morganite and that the agreement was a continuation of the discriminatory process. Morganite never investigated his claims nor provided him with a fair opportunity to challenge the false allegations. (App. 81a). Mr. Blizzard admitted that because of the authority of Mr. Bone as plant manager, the allegations regarding Mr. Gibbs threatening Mr. Bone were not investigated. When asked why he did not conduct an investigation, Mr. Blizzard replied, "(W)hat else am I supposed to do? It was a one on one conversation. Morgan would probably deny it, but this is the plant manager (Bone), and I have no power over him." (App. 79a).

Per this agreement, Mr. Gibbs and his personal belongings were subjected to routine searches by several management officials and co-workers over the course of the next year. (App. 85a). In February 1996, Mr. Gibbs wrote two letters to the headquarters office of Morganite in England to protest the discrimination. Mr. Gibbs never received a response to either letter.

During one of the first meetings with Mon Vonkchalee (hereinafter referred to as "Mon") in December 1996, Mr. Gibbs brought to Mon's attention the discriminatory treatment he had endured over the years from Morganite. He also discussed with Mon the objections that David Cooper had with him regarding his interracial relationship. (App. 57a).

During this meeting, Mr. Gibbs requested advance approval to use some personal leave time on the first Monday of the first three months of 1997. Mr. Gibbs informed Mon that he would take no more than four hours of leave on each day. The personnel policy afforded each employee personal paid time to use at their own discretion so long as they obtained prior approval. The use of personal paid time was commonly used by many employees at Morganite. (App. 57a-58a).

Mon agreed to the request, but asked Mr. Gibbs to report to him each Monday that personal time was to be used in order to verify the time of his arrival. On the first Mondays of January and February 1997, Mr. Gibbs took the requested time off without incident.

On February 19, 1997, Mr. Gibbs renewed his request for accommodations by submitting a letter to Mr. Blizzard (App. 50a). Mr. Gibbs did not receive a response from Morganite.

On March 3, 1997, Mr. Gibbs took two hours personal leave per the December 1996 approval and agreement Mr. Gibbs had received from Mon. When Mr. Gibbs arrived at work, he located Mon standing in front of Mr. Bone's office and reported to Mon that he had arrived per the agreement. (App. 58a-59a).

After Mr. Gibbs' termination, Mon claimed in three separate statements that Mr. Gibbs' reasons for being late were because he had a headache and his girlfriend failed to call in on his behalf. (App. 93a-99a). Mon's admission that Mr. Gibbs had in fact informed him that he was late because of the prior approval only surfaced during Mon's deposition. (App. 88a). When Mon asked Mr. Gibbs to step outside the building to discuss his late arrival, Mr. Gibbs reminded Mon of the prior approval in December 1996 and Mon responded, "oh, damn, I forgot that. (Y)eah, that's right". (App. 60a).

On Tuesday, March 4, 1997, Mon presented Mr. Gibbs with a written reprimand for being late. Mon explained to Mr. Gibbs that Roger Bone had told him to give Mr. Gibbs a second-level counseling reprimand for reporting late to work on the previous day. (App. 61a). Mr. Gibbs did not say anything in a threatening manner, but did inform Mon that he was "tired of this shit." He declined to sign the reprimand and departed the office. (App. 61a). Mon admitted that he did not believe that Mr. Gibbs was threatening him or anyone else. Mon conceded that Mr. Gibbs was upset because he thought that the issue regarding the disciplinary action was resolved, ". . . probably think (sic) that it was okay to tell somebody two months ahead of time that he was going to be off for a couple of hours, three months later or something . . ." (App. 88a). Mr. Gibbs went to his work station to retrieve his copy of the Morganite policy book and then returned to Mon's office to explain to him that the prior approval Mon gave him in December 1996 was sufficient notification to Morganite. Mon does not deny that Mr. Gibbs returned to

his office with the Morganite policy book to discuss Mon's prior approval. (App. 89a).

Mon then admitted to Mr. Gibbs that if he did not give Mr. Gibbs the disciplinary action, that Roger Bone would "have his ass in a sling." (App. 64a). After a brief discussion on the issue, Mon promised to straighten the matter out because he was in the wrong. Mon and Mr. Gibbs then shook hands and Mr. Gibbs departed. Later that day on March 4th, Mon stopped by Mr. Gibbs' workstation and told him that he had taken care of everything and patted him on the shoulder. (App. 61a-62a).

Mr. Gibbs worked his regular shift the remainder of the week without incident or complaints from any management official. However, on March 11, 1997, Doug Blizzard was informed by Mon that Mr. Gibbs had made several threatening remarks on Monday, March 3, 1997.

On March 12, 1997, Mon informed Mr. Gibbs that he had to issue him a second-level counseling statement. Mr. Gibbs response to Mon was "that's cool" and departed the room. (App. 63a). Mr. Gibbs never saw a copy of the counseling statement.

Prior to the work day ending, Mr. Gibbs ran into Mr. Bone near his break area. Mr. Gibbs and Mr. Bone had a discussion about the discipline. At the Employment Security Commission hearing, Mr. Gibbs testified as to a conversation he had with Mr. Bone as follows:

> I asked him (Bone), I asked him if Mon had mentioned to him anything about me coming in, about the advanced notice that I had given, he said that long term advance notice was not permissible. He said that, you couldn't do that and I told him that, I said well, my my policy books says otherwise,

> you know, I said show me in yours what, where that is, he said, you're a big boy, you can read, you know, he said you're a big boy, you should be able to read. (App. 84a).

In their motion for summary judgment, Morganite claimed that when Mr. Gibbs first learned about the reprimand that he left Mon's office threatening to harm Mr. Blizzard and Mr. Bone. Although Mr. Gibbs forecasted evidence that disputed this account, it was stricken from the proceeding as a result of the state law which precluded the use of ESC testimony in any other proceeding.

This evidence proved that Mr. Gibbs was not in the state of mind as described by Mon towards Mr. Bone and Mr. Blizzard. As a matter of fact, the conversation between Mr. Bone and Mr. Gibbs concluded with Mr. Bone inviting Mr. Gibbs to go to Mr. Blizzard's office to discuss his complaints about the discipline. As Mr. Gibbs departed to Mr. Blizzard's office, Mr. Bone reminded him that he would have to "dance to our (Morganite) drums" and referred to him as "Chief" when he departed. (App. 85a).

When Mr. Gibbs reported to work on March 13, 1997, he was terminated by Roger Bone without being informed of any specific details regarding who he threatened or when. Furthermore, Morganite recategorized the 1995 insubordination incident involving Bert Jenkins as a threatening action by Mr. Gibbs in an effort to taint his work record. Mr. Gibbs did not learn that he had allegedly threatened Mr. Jenkins or any of the details regarding his termination until the ESC hearing in September 1997.

The three written versions by Mon of his account of the events that transpired on March 3, 4, and 12, 1997

were prepared and signed on March 16, 1997 which was after Mr. Gibbs had been terminated. (App. 93a-99a). While Mr. Gibbs was informed that he was terminated because he had made threatening remarks, he was never provided details as to whom he allegedly threatened or when the alleged incident occurred. (App. 81a).

Following Mr. Gibbs' termination, a hearing was conducted before the Employment Security Commission (ESC) to determine Mr. Gibbs' eligibility for unemployment compensation. The controlling issue involved whether Mr. Gibbs was discharged for misconduct. During this hearing, Morganite failed to meet its burden to prove that Mr. Gibbs was guilty of threatening any employee of Morganite. Of significance was the reasons given by Morganite at the hearing were in contradiction to what was later asserted in this case. ESC granted Mr. Gibbs the relief he sought.

Mr. Gibbs filed a complaint in federal District Court alleging discrimination on the basis of race and disability in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.*, as amended by the Civil Rights Act of 1991, the Civil Rights Act of 1866, 42 U.S.C. 1981, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* On June 1, 2000, Morganite, Inc. filed a motion for summary judgment. In response to Mr. Gibbs' opposition to the summary judgment, Morganite filed a motion to strike all references to Mr. Gibbs' hearing taken before the Employment Security Commission Hearing in 1997.

The court granted Morganite's motion for summary judgment on October 6, 2000 and struck from the record the ESC evidence Mr. Gibbs by dismissing the case in its entirety.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE COURT IMPROVIDENTLY GRANTED SUMMARY JUDGMENT BY INCORPORATING ADDITIONAL SUBJECTIVE STANDARDS TO THE PLAINTIFF'S BURDEN OF PROOF UNDER *McDONNELL DOUGLAS* AFTER THE PLAINTIFF HAD DEMONSTRATED THE EXISTENCE OF A MATERIAL QUESTION OF FACT, HAD FORECASTED A PRIMA FACIE CASE AND PRODUCED EVIDENCE DEMONSTRATING PRETEXT?

Mr. Gibbs forecasted sufficient evidence to establish a prima facie case of retaliation under Title VII and 1981 as stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1877 (1973). To prove unlawful discrimination under the McDonnell Douglas framework, the employee "must carry the initial burden . . . of establishing a prima facie case, by producing evidence adequate to create an inference that an employment decision was based on a(n) (illegal) discriminatory criterion," *Teamsters v. United States*, 431 U.S. 324, 258 (1977). A prima facie case of retaliation under either Title VII or 42 U.S.C. 1981 requires a showing that the employee (1) engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection existed between the protected activity and the adverse employment action. *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998).

Once established, the burden shifted to Morganite to "rebut the presumption of discrimination by producing evidence that the discharge of Mr. Gibbs was for a legitimate, nondiscriminatory reason." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254,

67 L.Ed.2d 207, 101 S.Ct. 1089 (1981). Assuming Morganite had in fact met their burden of production, Mr. Gibbs forecasted sufficient evidence proving pretext. *Mary's Honor Ctr. v. Hick*, 509 U.S. 502, 506-11, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993).

The court impermissibly altered this burden of proof standard when it held that Mr. Gibbs failed to show that "none of the employees at Morganite felt threatened by him." (App. 23a). In effect, the district court materially altered the McDonnell Douglas test when it placed an unfair burden upon Mr. Gibbs to prove the subjective state of mind of Morganite's employees. The primary objective of the McDonnell Douglas was to permit Mr. Gibbs to establish a prima facie case of discrimination through indirect evidence which established an inference of discrimination. The requirements of the court that Mr. Gibbs prove that he did not scare any employees or that he did not make any employee feel intimidated or threatened essentially required him to produce direct evidence of the state of mind of his co-workers which is contrary to the burden or proof standard established in McDonnell Douglas.

Mr. Gibbs' evidence that he never threatened any employee at Morganite was sufficient to avoid the summary judgment. The evidence forecasted by Mr. Gibbs as to whether he actually threatened anyone was a question of fact that should have been resolved by the fact finder. Furthermore, the requirement by the court that Mr. Gibbs prove that the exact same comments that he denied making were not causing any supervisor or other employee to feel threatened violated the requirement for establishing a prima facie under McDonnell Douglas.

To reach this decision, the court of appeals permitted the district court to substitute its view of the weight of

the evidence for the jury's view and failed to draw all reasonable inferences in Mr. Gibbs' favor. Mr. Gibbs' evidence included acts of discriminatory treatment that he encountered from his first day of employment until the day of his termination. The district court's conclusion that the evidence of discrimination by Mr. Gibbs was too remote in time was based on little to no weight being given to the evidence forecasted by Mr. Gibbs that took place within the last 18 months of his employment. (App. 29a-31a).

The district court's determination that Morganite's non-discriminatory explanation for its action was ". . . honestly described, but poorly founded . . ." represented an improper credibility determination and a clear measurement of the evidence which is contrary to the principles that a court should consider on summary judgment. The premise of Mr. Gibbs' case was that he was continuously accused of misconduct each time that he requested accommodations for his ailments or opposed the discriminatory treatment he encountered while employed with Morganite. The rejection by the court of Mr. Gibbs' evidence of pretext essentially endorsed Morganite's contention that Mr. Gibbs' had in fact threatened some of his co-workers. (App. 21a), although he consistently denied any such actions.

This evidence involved material factual circumstances that supported the very foundation of Mr. Gibbs' case and as such, should have been resolved by the fact finder and not the court. Summary judgment may not be granted unless the submission of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P.

Summary judgment should be granted only where it is "perfectly clear that no issue of fact is involved and inquiry into facts is not necessary to clarify application of the law." *McKinney v. Bd. of Trustees of Maryland Community College*, 95 F.2d 924, 928 (4th Cir. 1992).

In granting summary judgment, the court could not avoid making the impermissible factual determination that Mr. Gibbs had in fact communicated threats. This Court has outlined the standards for judgment as a matter of law under Rule 56 with the courts being required to review all of the evidence in the record, *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 487, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986) draw all reasonable inferences in favor of the nonmoving party, but make no credibility determinations or weigh any evidence, *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555, 108 L.Ed.2d 504, 110 S.Ct. 1331 (1990). The latter functions, along with the drawing of legitimate inferences from the facts are for the jury, not the court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S.Ct. 2500 (1986). A material fact is in dispute when its existence or non-existence could lead a jury to different outcomes. *Id.* A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *Id.* Thus, although the court should review the records as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to follow. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 130, 120 S.Ct. 2097, 68 U.S.L.W. 4480, 82 Fair. Empl. Prac. Cas (BNA) 1748. (June 12, 2000).

Contrary to these line of cases, the court made the factual determination that Mr. Gibbs had threatened

employees at Morganite and that the employer acted reasonable when it terminated Mr. Gibbs. From this premise, the court then required Mr. Gibbs to prove that his alleged threatening actions did not cause the employees to feel intimidated. Mr. Gibbs' evidence supported a clear inference that his termination was a pretext by Morganite and that their true reason for disciplining Mr. Gibbs and eventually terminating him was his repeated statements in opposition to the discrimination that he felt existed. Rather than the court disregarding the evidence favorable to Morganite, the court impermissibly weighed the evidence presented by Morganite against the evidence submitted by Mr. Gibbs.

The evidence forecasted by Mr. Gibbs proved that from the time he was first employed by Morganite, he was subjected to a racially hostile working environment. A reasonable jury could have concluded that discriminatory practices of this nature continued and that the adverse actions taken against Mr. Gibbs while he was employed at Morganite were a continuation of the discrimination.

He was subjected to demeaning searches of his person, his personal effects and even his car. He was constantly subjected to a steady barrage of opprobrious (racial and ethnic) comments from his coworkers and superiors. Mr. Gibbs stated that the harassment took all forms of physical and mental tactics such as the incident when Roger Bone drew a picture of the Washington Monument on a piece of paper and sectioned it in a manner to demonstrate a KKK hierarchy at Morganite (App. 48a).

Morganite admitted that the accusations that Mr. Gibbs threatened any employees were never investigated nor was Mr. Gibbs provided a fair opportunity to grieve or challenge the allegations. (App. 81a). The evidence as

forecasted by Mr. Gibbs supported a clear inference that each time Mr. Gibbs opposed actions he felt were unfair or discriminatory, uncorroborated allegations from Morganite would surface that Mr. Gibbs was a threat and his issues of discrimination would be subordinated. A reasonable jury could infer that this was a tactic by Morganite to stifle Mr. Gibbs' attempts to oppose their discriminatory practices.

In considering whether there was sufficient evidence of discrimination to support a claim of retaliation, the court failed to take into account the February 19, 1997 letter from Mr. Gibbs to Morganite requesting accommodations for his ailments. Although this letter was presented to Mr. Blizzard only three weeks before the allegations by Morganite surfaced that Mr. Gibbs made the threatening remarks that resulted in his discharge, (App. 32a) the court deemed this evidence as "unpersuasive in light . . ." of Mr. Gibbs previous requests for accommodations.

The district court impermissibly substituted its perspective for that of a jury when the court declined to consider the February 19th letter as a causation of Mr. Gibbs' termination. The court's reasoning that Mr. Gibbs had made previous complaints of discrimination encroached upon the principles that the drawing of legitimate inferences from the facts are for the jury, not the court. *Anderson, Id.* A reasonable jury could find that Morganite's previous failures to respond to Mr. Gibbs' requests for accommodations represented a pattern of discrimination which motivated their decision to terminate him after his last request.

The very fact that Mr. Gibbs reported to work late on the first Monday of January and February 1997 *without incident,* coupled with the letter being delivered

a few weeks before he was terminated created a sufficient basis for a reasonable jury to infer that Morganite's effort to discipline Mr. Gibbs for being late and subsequently terminating him were pretextual. The court did not give sufficient weight to Mr. Gibbs' prima facie evidence and evidence of pretext, and it failed to draw all reasonable inferences in Mr. Gibbs' favor. For example, the court noted that Mr. Gibbs' evaluations indicated a lack of cooperation. (App. 7a-8a). Again, the district court made this finding while totally disregarding the evidence forecasted by Mr. Gibbs that his rating under the "lack of cooperation" element was lowered to retaliate against him for his opposition to discrimination.

The district court also noted in its finding that Mr. Gibbs was "counseled several times for engaging in threatening conduct." (App. 9a). This finding by the court represented the fundamental error that the court committed by impermissibly weighing the evidence as forecasted by Mr. Gibbs and Morganite. Inferences that should have been drawn in favor of Mr. Gibbs as the nonmovant, were instead concluded to the advantage of Morganite.

While Mr. Gibbs was employed by Morganite, he was informed by Morganite only one time in January 1996 that he had ever threatened an employee. As noted earlier, on that single occasion Mr. Gibbs was not counseled, but simply informed of the allegations and directed to sign a compromise agreement or he would be terminated. The court concluded that Mr. Gibbs had been counseled about the alleged threatening behavior on multiple occasions. (App. 9a). On that one occasion, Mr. Gibbs' concerns were that he was never informed of the specific allegations as to what he allegedly stated

or whom he had threatened until after he was discharged. In making such a ruling, the court essentially gave little weight to Mr. Gibbs' strong denials of the allegations by Morganite that he threaten anyone and his repeated requests for an opportunity to challenge the allegations.

The evidence as forecasted by Mr. Gibbs proved that he did not threaten Mr. Bone nor any other employee. Furthermore, the forecasted evidence proved that not only did Morganite fail to investigate the allegations against Mr. Gibbs, the company was unable to determine among their own managers exactly who it was that they were accusing Mr. Gibbs of threatening. Mr. Cooper said it was two employees. Mr. Blizzard claimed it was a third employee, and Mr. Gibbs' evidence was that he never threatened anyone. In light of the central question being whether Mr. Gibbs did in fact threaten anyone, it was error for material issues such as this one not to be resolved by the fact finder.

Despite Mr. Gibbs' evidence that threats were not made and that he was never informed that he had threaten anyone until after he was terminated, the court gave impermissible weight to Morganite's claim that Mr. Gibbs was informed by both Roger Bone and Doug Blizzard that he was terminated for threatening management officials. The district court overlooked the forecasted evidence that Mr. Gibbs was informed of the reasons for his discharge only months *after* he was terminated and the fact that he was afforded no opportunity to protest his discharge.

When an employee provides sufficient evidence for the fact finder to reject the nondiscriminatory explanation offered by the employer, not only may the fact finder continue to infer discrimination from the prima facie

evidence, but it now has additional evidence from which it may reasonably infer discrimination. "As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). The evidence forecasted by Mr. Gibbs demonstrated that Morganite changed their story in January 1996 about who Mr. Gibbs allegedly threaten on the single occasion that he was told that he had threatened someone. Mr. Blizzard testified that Mr. Gibbs had threaten Mr. Bone. (App. 78a). Mr. Gibbs denied that he threatened Mr. Bone, while another supervisor, Russell Lee, believed that it was Mr. Glenn Knight who Mr. Gibbs had threatened. (App. 75a). Interesting enough, Mr. Cooper, the second line supervisor, testified that Mr. Bone never informed him that Mr. Gibbs threatened him. (App. 92a).

Morganite's apparent inconsistency as to whom, if anybody, Mr. Gibbs allegedly threatened goes to the credibility of their story and created the clear inference that they were making the entire matter up. Based on the sheer number of inconsistencies in Morganite's story, a reasonable jury could infer that discrimination was their true motive in discharging Mr. Gibbs.

Summary judgment is only appropriate where there are no disputed issues of material fact "and inquiry into the facts is unnecessary to clarify the application of the law." *Hagvistola v. Community Fire Co.*, 6 F.3d 211, 214 (4th Cir. 1993). Morganite claimed that Mr. Gibbs stormed from the building in a crazed state searching to harm Mr. Bone and Mr. Blizzard was totally the factual opposite of Mr. Gibbs' account of the same event. Mr. Gibbs'

forecasted evidence was that Mr. Bone *in fact* was the last person Mr. Gibbs spoke to prior to departing the tool room area. It would not have been unreasonable for a jury to conclude that the events occurred as Mr. Gibbs forecasted and that after he spoke with Mr. Bone, that Mr. Gibbs took Mr. Bone's advice and went to Mr. Blizzard's office to discuss the proposed disciplinary action against him.

Mr. Gibbs may demonstrate pretext by showing "either that a discriminatory reason more than likely motivated the employer's proffered explanation or . . . that the employer's proffered explanation is unworthy of credence." *Hardy v. S.F. Phosphates L.C.*, 185 F.3d 1076 (10th Cir. 1999). The pertinent question to determine pretext is not whether the employer was right to think the employee engaged in misconduct, but whether that belief was genuine or pretextual." *Id.* at 1080.

A prima facie case of discrimination, combined with sufficient evidence for a trier of fact to believe the defendant's legitimate, nondiscriminatory reason for its decision, is sufficient as a matter of law to show intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, Id. Morganite admitted that they did not investigate any of the allegations that were made against Mr. Gibbs. Whether Morganite's inactions were reasonable should also have been determined by the fact finder.

Once the allegations were made that Mr. Gibbs threatened an unidentified employee, Morganite imposed discipline upon Mr. Gibbs without making any reasonable attempt to determine whether he committed the alleged offense. Morganite's failure to make any fair or reasonable determination about what actually transpired represented a total failure on their part to act in good faith.

Morganite's acted in bad faith by failing to initiate some type of investigation relates back to when Mr. Gibbs was accused of threatening Roger Bone in 1996. A reasonable investigation at that time would have proven that Mr. Bone was not threaten and brought into question the discriminatory motives of those making these allegations.

Morganite should not have been permitted to claim "good faith" after they deliberately refused to investigate the allegations of discrimination by Mr. Gibbs and refused to provide him with an opportunity to challenge the false allegations that he had threatened anyone. Mr. Gibbs was entitled "to have the credibility of his evidence as forecasted assumed, his version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to him." *Miller v. Leathers,* 913 F.2d 1085, 1087 (4th Cir. 1990). At this stage, the court is not required to weigh the evidence nor try to determine the truth of the matter, the court's sole duty is to determine whether there is a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.,* 447 U.S. 242, 259, 106 S.Ct. 22505, 91 L.Ed.2d 202 (1986).

With each inference being drawn against Mr. Gibbs, he could not meet his burden under Rule 56 by forecasting evidence that he did not threaten any employee. A modified version of pretext-plus has been created which required Mr. Gibbs to prove what the state of mind was of those he allegedly threatened.

Accordingly, this Court should vacate the decision below and remand this case for trial.

II.

WHETHER A STATUTORY PRIVILEGE UNDER NORTH CAROLINA GENERAL STATUTE 96-(t)(5) CAN PRECLUDE THE INTRODUCTION OF PLAINTIFF'S EVIDENCE OF PRETEXT IN A TITLE VII CASE?

As part of Mr. Gibbs' evidence to prove pretext, he introduced the testimony offered by Doug Blizzard before the North Carolina Employment Security Commission on September 19, 1997, some six months after Mr. Gibbs had been terminated. At that hearing, Mr. Blizzard testified that Mr. Gibbs had threaten Mr. Bone during the January 4th incident. (App. 86a). Another supervisor, Mr. Russell Lee, testified in his deposition that Glenn Knight was the person who had been threatened. (App. 75a). This evidence proved that Morganite did not act in good faith when it disciplined Mr. Gibbs because Morganite had no reasonable belief at that time as to who, if anyone, had made such a claim.

Furthermore, Mr. Gibbs sought to introduce other evidence showing that on the day before he was discharged, he had a conversation with Mr. Bone at his workstation and that Mr. Bone had instructed Mr. Gibbs to go to personnel to discuss his disciplinary actions with Mr. Blizzard. Morganite presented no evidence to contradict this evidence. This evidence was in stark contrast to Morganite's claim that Mr. Gibbs' stormed from the building searching for Mr. Bone and Mr. Blizzard and threatening to harm them.

The court granted Morganite's request pursuant to Rule 12(f) of the Federal Rules of Civil Procedures to strike from the record and not consider the ESC transcript as part of the summary judgment. The court held that the ESC evidence forecasted by Mr. Gibbs was

redundant and in any event stricken pursuant to the statutory privilege under North Carolina General Statute 96(t)(5). (App. 14a).

The court held it must balance the interest behind the absolute privilege of Section 96(t)(5) of the North Carolina General Statutes against the countervailing federal interest of Title VII. The case law in the Fourth Circuit on this issue is in direct conflict and are not of one accord. The court relied upon *Hartsell v. Duplex Prod., Inc.*, 895 F. Supp. 100, 102-03 (W.D.N.C. 1995) in ruling that the state privilege outweighed Mr. Gibbs' federal rights under Title VII and the other federal civil rights statutes. (App. 14a).

Hartsell is in contrast with *Odinkemelu v. Consolidated Stores Corporation*, No. 2:95CV00826, 1998 U.S. Dist. LEXIS 8150 (M.D. N.C. April 3, 1998) (unpublished opinion; Appendix D), where that court weighed the "historical and policy considerations underlying the state privilege and concerns of comity against the federal interest at stake." *Id.* In so doing, that court held that the federal interest in enforcing the protections of Title VII controlled and that the ESC testimony in that case was not privileged.

The reasoning found in the Odinkemelu case provides a more coherent assessment as to how the various competing interests should be balanced. Most notably, this decision acknowledges the mandates of the legal precedent established by this Court as to the allocation and standards for the burden of proof for a Title VII plaintiff. The Odinkemelu decision essentially left intact this Court's pronouncements as to what evidence a Title VII plaintiff will have available to meet the legal burdens under *McDonnell Douglas.*

In this case, the effects of this holding severely prejudiced Mr. Gibbs by the exclusion of critical evidence of pretext and evidence to support his prima facie case. Mr. Gibbs carried the burden under Title VII and the other civil rights statutes to not only establish a prima facie case, but to also be prepared to go forward with evidence to prove pretext. The ruling by the court severely hampered Mr. Gibbs' ability to demonstrate the obvious inconsistencies and fabrications in Morganite's articulated reason for Mr. Gibbs' dismissal.

As an initial matter, any time a person takes an oath and gives testimony, they should always be required to tell the truth. Morganite's testimony before the ESC was under oath and offered to explain their reasons for terminating Mr. Gibbs. Furthermore, testimony under oath should always be subject to a credibility check both during and after the testimony is taken. The truth is the truth regardless of the forum and Morganite should not have been permitted to use the state privilege to shield themselves from their own fabricated statements.

The exclusion of this evidence permitted Morganite to revise their reasons for terminating Mr. Gibbs without prejudice. The reasons given before the ESC were rejected and thus the court ruling permitted them to revise the basis for their actions without fear of their revisions being presented to a jury.

Morganite's premise is that Mr. Gibbs became so upset about the March 11th discipline that he departed in an angry manner from his workstation threatening to harm Mr. Bone and Mr. Blizzard. However, the uncontroverted testimony of Mr. Gibbs was that he had a conversation with Mr. Bone about his discipline without incident. (App. 84a). This evidence is in total contradiction with Morganite's claims that Mr. Gibbs stormed from the building searching for Mr. Bone. Furthermore, the need

for Morganite to investigate the allegations that Mr. Gibbs threatened an employee in January 1996 is evident by the fact that the management of Morganite is totally unclear as to who, if anyone, was threatened by Mr. Gibbs.

Morganite claimed that the participants at the ESC hearing did not expect their testimony to appear in a subsequent employment discrimination action. Mr. Gibbs had repeatedly complained to Morganite that he would pursue an EEOC charge if the discriminatory practices directed toward him were not abated. Furthermore, as Mr. Gibbs filed his EEOC charge in July 1997, two months before the September 1997 ESC hearing, Morganite cannot realistically claim that it did not anticipate that their testimony at the ESC hearing might eventually be part of a Title VII investigation or trial.

More to the point, the probative value of the testimony offered at the ESC hearing far outweighs any interest created by this state privilege. Each of the civil rights statutes that Mr. Gibbs is pursing requires him to maintain the burden of proof throughout the entire process. Mr. Gibbs must satisfy the three-step proof scheme established in *McDonnell Douglas Corp. v. Green,* Id. to prevail on all of his discrimination claims. Mr. Gibbs' ability to meet this burden under Title VII was severely impeded by the imposition of this privilege.

This Court has mandated that Mr. Gibbs must initially establish, by a preponderance of the evidence, a prima facie case of discrimination. Once established, the burden then shifts to Morganite to "rebut the presumption of discrimination by producing evidence showing a legitimate, nondiscriminatory reason for their actions. *Texas Dep't of Community Affairs v. Burdine, Id.* If Morganite met this burden of production, Mr. Gibbs

maintained the ultimate burden of proving pretext. *Mary's Honor Ctr. v. Hick, Id.* The very weight of the legal burden of proof that this Court has placed upon Mr. Gibbs substantially outweighed the privilege that the state statute is seeking to impose.

The defendants argued below that the issues and allegations peculiar to federal employment discrimination laws are not investigated, evaluated, or discussed at ESC hearings. However, in Mr. Gibbs' ESC hearing, the factual issue as to whether Morganite concocted bogus reasons for discharging Mr. Gibbs was the precise issue that was before the ESC hearing official. Morganite defended their justifications for firing Mr. Gibbs by introducing substantial evidence that Mr. Gibbs had a pattern of threatening behavior which resulted in his last chance agreement in January 1996 and his eventual termination in March of 1997. The same exact issue is present in this case.

A reasonable jury could infer that Mon's initial deception about Mr. Gibbs' explanation for being tardy was accomplished solely to disguise Morganite's objections to Mr. Gibbs' continued statements in opposition to the discrimination he was experiencing. When Mon's testimony at his deposition is compared with his ESC testimony, a reasonable jury could conclude that the decision to terminate Mr. Gibbs was a pretext.

To prove pretext in this case, Mr. Gibbs must show that the allegations that he threatened any Morganite employee were concocted in order to justify his discharge for articulating opposition to the discriminatory practices he encountered at Morganite. Mr. Gibbs must show that Morganite's proffered explanation that he was threatening other employees is unworthy of credence. *Tuck v. Henkel Corp.*, 973 F.2d 371, 374-75 (4th Cir. 1992), cert. denied, 507 U.S. 918, 122 L.3d.2d 671, 113

S.Ct. 1276 (1993). To make this demonstration, Mr. Gibbs demonstrated that as between his explanation and Morganite's, his race, his opposition to discrimination and/or his disabilities were the more likely reasons for his dismissal, or that Morganite's proffered explanation is simply unworthy of credence." *Tuck*, 973 F.2d at 375.

In response to the summary judgment motion in a Title VII case, it is Mr. Gibbs who must come forward with sufficient evidence demonstrating that he can in fact prove each element of his claim and that a genuine issue of fact exists. While there exists sufficient evidence in the depositions to support each claim that is being pursued by Mr. Gibbs, the clearest example of pretext is shown by the contradictions made by Morganite at the ESC hearing. Mr. Gibbs is entitled "to have the credibility of his evidence as forecast[ed] assumed, his version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to him." See *Miller v. Leathers*, Id.

The exclusion of this evidence denied Mr. Gibbs a fair opportunity to produce evidence in support of his prima facie case and to prove that the articulated reasons by Morganite were a pretext. Rule 56 required Mr. Gibbs to come forward with evidence in response to the summary judgment motion filed by Morganite. Furthermore, this Court has repeatedly recognized the obligation of a Title VII plaintiff to come forward with sufficient evidence to support a prima facie claim of discrimination as well as evidence of pretext.

Due process is compromised when Mr. Gibbs was essentially precluded from meeting his burden under either Rule 56 or Title VII as a result of state privilege being imposed. The evidence from the ESC hearing is

compelling evidence that clearly outweighs the state privilege interest.

In the context of Title VII litigation, it is absolutely essential that a plaintiff be permitted to impeach the "articulated non-discriminatory reason" that the defendant brings forward. Morganite should not have been permitted to alter or abandon their initial reason for terminating Mr. Gibbs after suffering an adverse decision before the ESC. This is especially true in a case such as this one where Mr. Gibbs was never made aware of the reason that he was terminated until the ESC hearing. An employer should not be allowed special forums in which to audition viable reasons for terminating an employee.

Accordingly, this Court should reverse the court of appeals' decision which struck the pretext evidence pursuant to the statutory privilege and to remand the case for trial.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Fourth Circuit and ultimately, to vacate and reverse and remand the case to the District Court for trial.

This the 28th day of December, 2001.

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Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES MORGAN GIBBS, JR.,

Petitioner,

v.

MORGANITE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[UNPUBLISHED]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2448

JAMES M. GIBBS, JR.,

Plaintiff-Appellant,

versus

MORGANITE, INCORPORATED,

Defendant-Appellee.

and

WIN STEPHENS, individually and in his official capacity; MON VONKCHALEE, individually and in his official capacity; DAVID COOPER, individually and in his official capacity; BRUCE MILLER, individually and in his official capacity; ROGER BONE, individually and in his official capacity; EDWIN ENNIS, individually and in his official capacity; DOUG BLIZZARD, individually and in his official capacity; LARRY WEST; RUSSELL LEE, individually and in his official capacity; BERT JENKINS, individually and in his official capacity; PHILLIP BOWDEN, individually and in his official capacity,

Defendants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-99-309-5-BR2)

Submitted: May 31, 2001 Decided: July 30, 2001

Before: WILKINS, MOTZ, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

James H. Locus, Jr., LOCUS LAW FIRM, Fayetteville, North Carolina, for Appellant. Gregory P. McGuire, Sarah H. Roane, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, L.L.C., Relaigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

James Morgan Gibbs, Jr., filed suit against his Employer, Morganite, Inc. ("Morganite"), alleging discrimination on the basis of race and/or national origin and disability, in violation of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, 42 U.S.C.A. §1981 (West Supp. 2000), and the American with Disabilities Act ("ADA"). He now appeals the district court's order granting summary judgment to Morgante, granting Morganite's motion to strike, denying Gibbs' motion to amend, and dismissing the action.

This Court reviews a grant of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863

F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This Court must view the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

We have reviewed the parties' briefs and the materials submitted in the joint appendices, and fully considered the arguments raised on appeal. We find that the district court's opinion is thorough and well-reasoned. We therefore affirm on the reasoning of the district court. *See Gibbs v. Morganite, Inc.*, No. CA-99-309-5-BR2 (E.D.N.C. Oct. 6, 2000) (J.A. at 68-103). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

[Filed Oct. 6 2000]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:99-CV-309-BR2

JAMES M. GIBBS, JR.,

Plaintiff,

v.

MORGANITE, INC., et al.,

Defendant.

ORDER

This matter is before the court on defendant's motion for summary judgment and its motion to strike selected portions of plaintiff's affidavit submitted in support of plaintiff's opposition to that summary judgment motion. Plaintiff's motion to amend his complaint is also before the court.

On 10 May 1999, plaintiff James M. Gibbs, Jr. filed this action against defendants Morganite, Inc., David Cooper, Bruce Muller, Roger Bone, Edwin Ennis, Doug Blizzard, Larry West, Russell Lee, Win Stephens, Pimol (Mon) Vonkchalee, Bert Jenkins, and Phillip Bowden alleging discrimination on the basis of race and disability

in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended by the Civil Rights Act of 1999, the Civil Rights Act of 1866, 42 U.S.C. §1981, and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* Morganite filed an answer on 9 June 1999. Although plaintiff filed his action *pro se*, attorney James H. Locus, Jr. filed his appearance on behalf of plaintiff on 1 September 1999. Subsequently, on 24 April 2000, the court permitted plaintiff to amend his complaint to dismiss all claims against the individual defendants in this matter. The only claims remaining for disposition in this matter are those against Morganite.

On 1 June 2000, Morganite filed this motion for summary judgment with a supporting memorandum. On 10 July 2000, plaintiff filed a response to defendant's motion, a supporting affidavit with several attachments, numerous depositions, a motion to supplement his response with a Fourth Circuit opinion, and a statement of objections regarding defendant's reliance upon plaintiff's diary in supports of its motion for summary judgment. On 19 July 2000, Morganite filed a reply and a motion to strike selected portions of plaintiff's affidavit. Plaintiff filed a response to the motion to strike on 28 July 2000. On 31 July 2000, plaintiff also filed a motion for leave to file a supplement to his response to the motion to strike.

On 20 September 2000, plaintiff filed a motion to amend his complaint to add state law claims for intentional infliction of "mental distress" against each of the originally named individual defendants in their individual capacities and possibly against Morganite itself. Defendant filed a response on the same date. While this motion is not yet ripe, the court's disposition of defendant's summary judgment motion requires the court to deny

the motion to amend as futile for reasons explained in further detail below.

As a preliminary matter, this court will allow plaintiff's motion to supplement his response to defendant's motion for summary judgment as well as plaintiff's motion to supplement his response to defendant's motion to strike. The remaining motions are also ripe for review.

I. Facts

Morganite is a manufacturer of carbon and commutator products, and its plant is located in Dunn, North Carolina. Morganite employed plaintiff, a self-described Black-Native American Indian, as a Tool and Die Maker in March 1987. (Gibbs Aff. ¶2; Pl's Dep. at 14 and 131.) Plaintiff continued working in that position until he was terminated ten years later on 13 March 1997. (Pl.'s Dep. at 22 and 48.) As a Tool and Die Maker, plaintiff sharpened dyes and other tools using a bench grinder. (Pl's Dep., Ex. 6.) Plaintiff alleges that his coworkers subjected him to harassment and hostility from 1987 through 1997, (Pl's Mem. at 1), and a detailed 55-page digest of a journal of plaintiff's employment problems with defendant has been submitted as Exhibit 12 to his deposition. Plaintiff originally submitted the diary digest to the EEOC in support of his charge of discrimination. (Pl's Dep. 193, Ex. 13.)[1]

---

[1] To the extent plaintiff has objected to defendant's use of the diary digest plaintiff submitted to the EEOC in support of his charges, the court overrules those objections. Having submitted the digest in an effort to establish his own case, plaintiff cannot bar defendant from relying upon the representations made by plaintiff therein.

From plaintiff's perspective, the most salient harassing and discriminatory event that took place while he was employed at Morganite occurred in 1987 when David Cooper, at the time the manufacturing manager for the commutator division, called him into his office to discuss the negative feelings generated among plant employes by plaintiff's relationship with a white woman. (Pl's Dep., Ex. 12 at 2-3; Compl. ¶¶9a and 9b.)[2] Repeatedly throughout his deposition and brief in opposition to summary judgment, plaintiff attributes defendant's conduct toward him, including the alleged harassment, the retaliation, the discriminatory treatment and termination, and even the failure to accommodate his alleged disabilities, to the company's disapproval of his interracial relationship reportedly verbalized by Cooper on one occasion in 1987. (Pl's Mem. at 1; Pl's Dep. at 130,[3], 132 133, 184, 228-229, and 242.) Despite plaintiff's issues with management and co-workers at Morganite, his job evaluations were steadily good and they improved toward the end of his employment with defendant. (Pl.'s Dep., Ex. 9.) Throughout his tenure with Morganite, however, plaintiff was encouraged to work more quickly and to increase his productivity. (Pl.'s Dep. at 122-123 and Ex. 9.) Less frequently, plaintiff's eval-

---

[2]Although Cooper explicitly testified in his deposition that such a conversation never took place, (Cooper Dep. at 31), the court will assume the truth of plaintiff's assertion for purposes of this summary judgment motion.

[3]Stating that he knew his evaluations were discriminatory as soon as he received them, as early as 1991, plaintiff testified that he protested the discriminatory evaluations "[b]ecause all of it went back to meetings that I had with Mr. Cooper in May of 1987 [referring to my interracial relationship]. Everything that happened to me went back to that – based on that incident with him, Edwin Ennis, Larry West. All racial. Everything else was based on that." (Pl.'s Dep. at 130.)

uations indicate a lack of cooperation. (Id.) Plaintiff received two merit raises and regular cost-of-living increases while employed at Morganite. (Pl.'s Dep. at 112.)

Plaintiff experienced some health problems while working at Morganite, and his ADA claims are based on defendant's failure to accommodate the alleged limitations arising from those problems. Plaintiff had surgery on his varicose veins in 1978, nine years before he began working for Morganite, but he continued to have leg problems associated with his varicose veins while working at Morganite. (Pl.'s Dep. at 63-64, Ex. 2.) Specifically, he complained of minor swelling in January and February of 1996, (Pl.'s Dep., Ex. 2), and he wore support hose to minimize his leg discomfort. In addition to his leg problems, plaintiff had some back problems while employed at Morganite. In May 1988, plaintiff had surgery for a herniated disk. (Pl.'s Dep. at 63.) He recovered well from surgery, and his medical records show that he had no significant complications after 1988. (Pl.'s Dep., Ex. 2.) Finally, plaintiff suffered from chronic fatigue syndrome while employed at Morganite. His condition was disgnosed in August or September of 1996. (Pl.'s Dep., Ex. 2.) Plaintiff's medical records show that, as of 18 October 1996, prescription Paxil seemed "to have helped immensely" and that plaintiff was eager to continue that treatment. (Id.) By 27 February 1997, plaintiff's medical records show that he was working eight hour days and continuing to improve due to the Paxil. (Pl.'s Dep. at 81, Ex. 2.) In his deposition, however, plaintiff asserts that the Paxil never helped his chronic fatigue syndrome. (Pl.'s Dep. at 83.) Plaintiff states that he repeatedly informed his supervisors and managers of the need for some specific accommodations to minimize his back and leg discomfort while working, and that he worked in constant pain. (Pl.'s Opp. at 4; Pl's Dep. at

102-103.) Specifically, plaintiff mentions a letter to Blizzard dated 19 February 1997, renewing previous requests for accommodations. (Pl.'s Dep. at 98.)

During his employment, plaintiff was counseled several times for engaging in threatening conduct toward Morganite employees. In late 1995, plaintiff disagreed with a performance evaluation completed by his supervisor, Russell Lee. (Pl.'s Dep. at 142-144.) Also in late 1995, David Cooper, General Manager, issued plaintiff a reprimand for his behavior during meetings with Russell Lee and Roger Bone regarding that evaluation. (Pl.'s Dep., Ex. 12 at 20.) In January 1996, Roger Bone and Russell Lee issued plaintiff a final counseling for threatening conduct plaintiff displayed during a meeting with Bone at which the two discussed his 1995 performance review. (Pl.'s Dep., Ex. 10.) Subsequently, Cooper required plaintiff to sign a written "Terms of Continued Employment," which document provided that plaintiff would not "use or imply any language, acts or behavior of a threatening or intimidating nature to any employee of Morganite" and that any such conduct would result in his termination. Plaintiff signed the document on 17 January 1996 under protest. (Pl.'s Dep. 160-165, Ex. 11.) According to plaintiff, Cooper, Bone and Russell never told him whom he had allegedly threatened on the occasion at issue.

In early March 1997, plaintiff had several exchanges with his immediate supervisor, Mon Vonkchallee, regarding an allegedly tardy arrival for work on 3 March 1997.

In a meeting held 4 March 1997, for the purpose of issuing to plaintiff a disciplinary counseling for being tardy on 3 March 1997, plaintiff told Vonkchalee that he was 'tired of this shit" and that he was "not signing any damn reprimand." (Pl.'s Dep. at 208, Ex. 12 at 45.)

Plaintiff then exited Vonkchalee's office only to return a short time later with his copy of the policy handbook to continue the conversation with Vonkchalee. As a result of that conversation, Vonkchalee crumpled up the written warning and threw it away. (Pl.'s Dep., Ex. 12 at 46; Vonkchalee Dep. at 30-33.) After discussing the matter with Bone and Blizzard, however, Vonkchallee determined that he had to go through with his decision to issue the warning, and, on 12 March 1997, he met with plaintiff to issue the second level disciplinary warning based on his tardiness on 3 March 1997. (Pl.'s Dep., Ex. 13.) Vonkchalee had at least two encounters with plaintiff on 12 March 1997. After one of those exchanges, Vonkchalee reported to Bone and Blizzard that he felt threatened by plaintiff's conduct toward him and toward Morganite officials in general. (Pl.'s Dep., Ex. 12 at 49, Ex. 13; Vonkchalee Dep. at 42-45, Ex. 5; Blizzard Dep. at 29, 31-32, Ex. 18). Bone and Blizzard decided to terminate plaintiff's employment based on plaintiff's reportedly threatening conduct. (Blizzard Dep. at 28-31.) On 13 March 1997, defendant terminated plaintiff's employment for engaging in intimidating and threatening conduct towards management employees. (Pl.'s Dep., Ex. 4.) David Cooper was not involved in defendant's decision to terminate plaintiff. (Cooper Dep. at 23.)

II. Motion to Strike

Before turning to the merits of defendant's summary judgment motion, the court will address defendant's motion to strike. Defendant Morganite has moved, pursuant to Fed.R.Civ.P. 12(f), to strike paragraphs Eight (8) through Fifteen (15) and Attachments D and E of the Affidavit submitted by plaintiff in support of his opposition to Morganite's motion for summary judgment.

The cited portions of plaintiff's affidavit refer to or replicate the proceedings held before the North Carolina Employment Security Commission (ESC) when plaintiff sought unemployment benefits before filing his Title VII action in federal court. Defendant claims that this evidence is privileged under N.C. General Statute §96-4(5)-(5), which provides:

> [a]ll letters, reports, communication, or any other matters, either oral or written, including any testimony at any hearing, from the employer or employee to each other or to the Commission or any of its agents, representatives, or employees, which letters, reports or other communications shall have been written, sent, delivered or made in connection with the requirements of the administration of [Chapter 96 of the North Carolina General Statutes], shall be absolutely privileged communication in any civil or criminal proceedings . . . .

State statutory privileges, however, like the one contained in N.C. Gen. Stat. §96-4(t)(5), do not automatically apply to federal claims in federal court. *Hartsell v. Duplex Products, Inc.*, 895 F. Supp. 100, 102 (W.D.N.C. 1995), aff'd, 123 F.3d 766 (4th Cir. 1997). First, a court must determine whether federal and state law conflict over the privilege at issue. While North Carolina law privileges ESC matters, federal law pertaining to Title VII does not provide such a privilege. Nor does federal common law contain any type of privilege relating to state unemployment benefits hearing transcripts. *Id.* at 102. See also *Yates v. Quincy's Restaurants, Inc.*, 1997 U.S. Dist. Lexis 21829, *5 (M.D.N.C. Dec. 17, 1997). "Although not required to do so, where no controlling federal law exists, a court may adopt an existing state privilege as federal common law." *Yates*, 1997 U.S. Dist. Lexis 21829 at *5. When

deciding whether to adopt a state privilege or when federal and state law appear to conflict, "federal courts must balance the interests underlying conflicting state and federal privilege law to determine which law controls the federal claim." *Hartsell*, 895 F. Supp. at 102. See also *United States v. Cartledge*, 928 F.2d 93, 96 (4th Cir. 1991) (adopting approach set out in *United States v. Gillock*, 445 U.S. 360 (1980), in which court employed a balancing test that weighed the historical and policy considerations underlying the state legislative privilege and the concerns of comity between state and federal sovereignties against the need to enforce the criminal statutes). To the extent that recognition of the state privilege could impair the federal government's legitimate interest in enforcing anti-discrimination laws such as Title VII, this court must decline to recognize an analogous privilege in a federal proceeding.

Pursuant to *Hartsell* and *Cartledge*, this court will balance the state and federal interests at issue to determine whether the state privilege should apply in this case. As the *Hartsell* court noted, the policy underlying North Carolina's privilege receives statutory expression. *Hartsell*, 895 F. Supp. at 102. The ESC

> oversees North Carolina unemployment benefits, and it conducts hearings to determine employers' rights and liabilities arising under Employment Security law. The ESC Privilege encourages full disclosure from claimants and employers at ESC hearings, and it prevents parties from conducting free discovery before litigation.

Id. See also *Odinkemelu v. Consolidated Stores Corp.*, 1998 U.S. Dist. Lexis 8150, *15 n.2 (M.D.N.C. Apr. 3, 1998) ("ESC privilege is presumably intended to en-

courage full disclosure from claimants at ESC hearings by preventing their statements from being used against them").[4] The *Hartsell* court also noted the fact that a

> Title VII claim heard in federal court commands a discrete adjudicative sphere from a state administrative proceeding. The North Carolina legislature has distinguished ESC hearings and civil trials as distinct proceedings by explicitly rejecting this testimony's admissibility in civil tribunals. ESC hearings do not investigate Title VII allegations, and ESC participants do not expect their testimony to appear later in a subsequent federal Title VII proceeding.

Hartsell, 895 F. Supp. at 103. The fact that plaintiff had already initiated his Title VII proceedings at the time his unemployment benefits case was heard does not, contrary to plaintiff's assertion, change the expectation of the parties, an expectation which is based on North Carolina law, and not upon the pendency of any particular suit.

The federal government, on the other hand, has an irrefutable interest in enforcing its antidiscriminatory laws. The federal rules, and the lack of a corresponding federal privilege, effectively promote the disclosure of probative evidence in this pursuit. The federal interest is limited in this case, however, because the probative value of the evidence plaintiff seeks to introduce is very

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[4] In *Odinkemelu,* the court found that the policy underlying the state privilege was inapplicable because the claimant sought to introduce the ESC testimony to bolster his own case. *Id.* at *15. While this court does not pass judgment on the validity of the decision in that case, the court notes that the additional policy considerations underlying the state privilege, which were discussed in more detail in *Hartsell, supra,* command a different result in this case.

limited. In his opposition to defendant's motion for summary judgment, plaintiff relies upon the ESC testimony on three occasions. (Resp. at 8, 23, and 24.) On two of those occasions, he cites his own testimony. On the other occasion, he cites to Blizzard's testimony in an effort to show defendant's inconsistencies as to reports of plaintiff's threatening conduct toward Morganite employees. As the *Hartsell* court explained, plaintiff's "thorough depositions obviate the need for additional testimony when such testimony is used only for impeachment purposes. . . . The desire to impeach witnesses does not outweigh the state interest in protecting confidential unemployment proceedings." *Hartsell,* 895 F. Supp. at 102. Plaintiff provides a further explanation of his alleged need to introduce ESC transcripts in his Title VII action in his response to defendant's motion to strike. His further explanation only serves to clarify the fact that the information he seeks to introduce can be found in the numerous depositions he has conducted for purposes of this proceeding.[5] As such, the ESC materials would be duplicative and there is no need to abrogate the state's statutory privilege for such a limited purpose. Moreover, plaintiff specifically refers, in his response, to the fact that the ESC concluded that he was not at fault for his termination. (Resp. to Motion to Strike at 3.) This factor is simply irrelevant to this court's determination of plaintiff's Title VII claims. Accordingly, the court will allow defendant's motion to strike paragraphs Eight (8) - Fifteen (15) of plaintiff's affidavit as well as Attachments D and E to that Affidavit. These materials will not be considered in this court's resolution of defendant's summary judgment motion.

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[5]Plaintiff deposed Blizzard, Lee, Cooper and Vonkchalee, among others. His own lengthy deposition is also part of the record.

III. Standard of Review

Summary judgment is appropriate only if the court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). To withstand summary judgment, the nonmoving party cannot rest on his pleadings; rather, the nonmovant must establish the existence of a genuine issue of material fact by presenting evidence on which the jury could reasonably find in his favor. *Anderson*, 477 U.S. at 252. When a court evaluates the evidence presented for purposes of a summary judgment motion, the nonmoving party is entitled to have the credibility of his evidence as forecast assumed; his version of all that is in dispute accepted; all internal conflicts in it resolved favorably to him; the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). As the Fourth Circuit has explained,

> [O]nly "reasonable" inferences from the evidence need be considered by the court. . . . '[I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.' . . . Whether an inference is reasonable cannot be decided in a vacuum; it must be considered "in

> light of the competing inferences" to the contrary. . . . In the end, the non-moving party must do more than present a "scintilla" of evidence in its favor. . . . Rather, the non-moving party must present sufficient evidence such that "reasonable jurors could find by a preponderance of the evidence" for the non-movant, . . . "for an apparent dispute is not 'genuine' within the contemplation of the summary judgment rule unless the non-movant's version is supported by sufficiient evidence to permit a reasonable jury to find the fact[s] in his favor." . . . Thus, if the evidence is "merely colorable" or "not significantly probative," a motion for summary judgment may be granted.

Sylvia Development Corp. v. Calvert County, Maryland, 48 F.3d 810, 818 (4th Cir. 1995) (citations omitted).

In his complaint, plaintiff alleges that he was subjected to a hostile working environment "of a continuing nature from 1987 until the date of [his] termination based on race, handicap, and retaliation," that Morganite failed to promote him and ultimately terminated his employment in violation of Title VII, §1981, and the ADA. (Compl. ¶4.)

IV. Title VII Claims

A. Discriminatory discharge

Morganite seeks summary judgment on plaintiff's claims that he was discharged on the basis of his race in violation of Title VII and 42 U.S.C. §1981. Title VII makes it an unlawful employment practice "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race . . . ." 42 U.S.C. §2000e-2(a)(1). Section 1981 also prohibits discrimination.[6] The elements of the two claims are the same. See *Stephens v. South Atlantic Canners, Inc. (Coca Cola Co.)*, 848 F.2d 484, 489 (4th Cir.) (§1981 employes the same prima facie case as Title VII), cert. denied, 488 U.S. 996 (1988); *Gairola v. Commonwealth of Virginia Department of General Services*, 753 F.2d 1281, 1285 (4th Cir. 1985); *Mumford v. CSX Transportation*, 878 F. Supp. 827, 831 (M.D.N.C. 1994), aff'd, 57 F.3d 1066 (4th Cir. 1995).

"Under Title VII, the plaintiff bears the initial burden of proving a prima facie case of discrimination by raising an inference that the defendant acted with discriminatory intent." *Karpel v. Inova Health System Services*, 134 F.3d 1222, 1227 (4th Cir. 1998).

> To establish [by circumstantial evidence] a prima facie case of discriminatory discharge under Title VII, [plaintiff] must establish that he is a member of a protected class, [that] he was qualified for the job he held and performed it satisfactorily, [that] in spite of his qualifications and performance [de-

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[6] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1981. See *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999) (holding that at-will employment relationships are contractual and can therefore serve as predicate contracts for §1981 claims).

> fendant] discharged him, and that the circumstances of the discharge raise the inference of discrimination.

Gedeon v. Host Marriott Corp., 1998 U.S. App. Lexis 16903, *6 (4th Cir. July 23, 1998). See also *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Karpel*, 134 F.3d at 1227-1228; *Booker v. Georgia-Pacific Corp.*, 688 F. Supp. 1069, 1971 (W.D.N.C. 1988).[7] Once a plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to set forth a legitimate, nondiscriminatory reason for the actions taken with respect to plaintiff. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.' " *Reeves v. Sanderson Plumbing Products*, ___ U.S. ___ , 120 S.Ct. 2097, 2106 (2000). If defendant meets its burden, plaintiff must then demonstrate that defendant's proffered reasons are pretextual. The burden of persuasion always remains with the plaintiff. In other words, as the Supreme Court wrote in *Hicks v. St. Mary's Honor Center*, 509 U.S. 502 (1993), "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* at 519.

The Court has recently clarified the *St. Mary's* interpretation of the *McDonnell Douglas* burden shifting

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[7] Plaintiff may produce direct evidence of defendant's discriminatory intent or, in the alternative, plaintiff may rely upon circumstantial evidence of sufficient probative force to create a genuine issue of material fact. See *McDonnell Douglas Corp.*, 411 U.S. at 802. Because plaintiff has not offered direct evidence of discrimination here, the court will analyze his claims under the *McDonnell-Douglas* circumstantial evidence test. *Karpel*, 134 F.3d at 1227-1228.

scheme applicable to Title VII and ADA cases in the context of an ADEA case. See *Reeves*, 120 S.Ct. at 2108-2109. Discussing the plaintiff's ultimate burden, the *Reeves* Court wrote that

> It is permissible for the trier of fact to *infer* the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:
>
> > "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." [*St. Mary's*, 509 U.S.] at 511, 113 S.Ct. 2742.
>
> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstancial evidence that is probative of intentional discrimination, and it may be quite persuasive. See *id.*, at 517, 113 S.Ct. 2742 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296, . . . (1992) . . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the

> actual reason for its decision. Cf. *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, . . . (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves, 120 S.Ct. at 2108-2109. See also *Fobian v. Storage Technology Corp.,* 217 F.3d 838, **4, 2000 WL 870494 (4th Cir. June 30, 2000); *Street v. Coin-Wrap, Inc.,* 2000 WL 964772 (D. Md. June 22, 2000) (applying *Reeves*).

Defendant argues that it is entitled to summary judgment on plaintiff's claim that his employment was unlawfully terminated on the basis of his race because plaintiff's failure to produce evidence raising an inference of racial discrimination precludes him from establishing a prima facie case of discrimination. (Def's Mem. at 8 and 10.) Defendant also contends that, regardless of whether plaintiff can establish the elements of a prima facie case with respect to his discharge, defendant has articulated a legitimate, nondiscriminatory reason for plaintiff's discharge that plaintiff cannot show is pretextual. (Id.) See *St. Mary's Honor Center,* 509 U.S. at 514-515.

Assuming for purposes of this analysis that plaintiff is a member of a protected class who was qualified for his position and performing satisfactorily at the time he was discharged by defendant, the court agrees with defendant that plaintiff has not shown that the circumstances of his

discharge raise the inference of discrimination. As explained in *Autry v. North Carolina Department of Human Resources,* 820 F.2d 1384, 1386 (4th Cir. 1987), this aspect of the prima facie case requires a showing of an evidentiary connection between the plaintiff's race and his termination. A plaintiff could make such a showing by demonstrating that he was replaced by a non-protected individual or that he was terminated under circumstances in which a similarly situated employee was not terminated. Morganite hired a black individual, John Clark, to replace plaintiff. (Pl.'s Dep. at 174-175.) Moreover, plaintiff has not introduced any evidence to show that other employees who allegedly engaged in similar threatening behavior were not terminated. (Pl.'s Dep., Ex. 6.) See *Moore v. City of Charlotte,* 754 F.2d 1100, 1107 (4th Cir.), cert. denied, 472 U.S. 1021 (1985) (comparison for purposes of establishing discrimination must be with employees engaged in behavior of comparable seriousness).

Even assuming that plaintiff could establish that he was terminated under circumstances giving rise to an inference of discrimination, however, plaintiff's Title VII and §1981 discriminatory discharge claims cannot survive summary judgment because he has failed to demonstrate that defendant's stated reasons for terminating his employment were pretextual.

Morganite has asserted that it discharged plaintiff because, on several occasions, throughout his tenure with Morganite, he reportedly engaged in threatening and intimidating conduct toward Morganite employees and supervisory and managerial staff. (Def.'s Mem. at 12.) Plaintiff acknowledged in his original charge filed with the EEOC on 23 May 1997 that he "was told by the Personnel Manager, Mr. Doug Blizzard, and [his] super-

visor, Mr. Roger Bone, both Caucasians, that [he] was discharged for displaying intimidating and threatening behavior toward management employees." (Pl.'s Dep., Ex. 4.) On 28 July 1997, plaintiff submitted an amended charge with an accompanying affidavit. In the amended charge, he explained that he had been told by Blizzard and Bone that he had been "terminated for violating the terms of a 1996 document referred to as: Regarding Terms of Continued Employment." Morganite required plaintiff to sign the foregoing document in January 1996 after counseling plaintiff for engaging in intimidating and threatening behavior toward his supervisor, Russell Lee, and towards Bone. (Pl.'s Dep. at 161.) Plaintiff denied engaging in any such behavior but signed the document to keep his job. (Pl's Dep. at 161, 164-165.) In the affidavit accompanying his amended charge, plaintiff reiterated that he had been told he was being discharged for engaging in intimidating and threatening behavior toward management employees. He stated:

> I am a very strong-willed and outspoken person who spoke up for myself and did not bow down to anyone. Several management employees, including Mr. [ ] Vonkchalee, Mr. Doug. Blizzard, and Mr. Roger Bone, did not like me because of this and were out to get me. *I believe that this is the real reason for my discharge.* However, I insist on filing a charge alleging discrimination based on my race, Black-Native American Indian, my age, 53, and my disability.

(Pl.'s Dep., Ex. 6.) (emphasis added).[8]

As the Fourth Circuit wrote in *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000), cert. denied,

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[8] Plaintiff has not pursued his claim of age discrimination.

___ S.Ct. ___ , 69 USLW 30867 (Oct. 2, 2000), "when an employer gives a legitimate, non-discriminatory reason for discharging the plaintiff, 'it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination.' " *Id.* (citation omitted). Moreover, as the Fourth Circuit has repeatedly held, in a wrongful discharge action, it is the perception of the decision maker that is relevant, not the self-assessment of the plaintiff. *Id.* at 280. While plaintiff has assuredly attempted to allege and demonstrate that he never, at any time, threatened anyone at Morganite, plaintiff has not shown that none of the employees at Morganite felt threatened by him.[9] Nor has he presented any evidence that Vonkchalee, Blizzard and Bone did not consider his conduct intimidating and threatening.[10] (See Vonk-

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[9]With respect to his interactions with Vonkchalee regarding his allegedly tardy arrival in March 1997, plaintiff states that, when Vonkchalee told him on 4 March 1997 that he had to give plaintiff a reprimand for coming in late on 3 March 1997, plaintiff made the following responses: "I'm tired of this shit. Meaning that I'm going to do something about it with the EEOC, NAACP. My same threats as I've made before. And I said I'm not signing any damn reprimand, and so I turned and walked out [of Vonkchalee's office]." (Pl's. Dep. at 208.) When he went back into Vonkchalee's office shortly thereafter with his copy of the policy handbook, plaintiff testified that they had a conversation "no hostilities or nothing. It was just talking." (Pl.'s Dep. at 211.) Plaintiff denied making several specific comments attributed to him by Vonkchalee and stated that the only thing he said that could have been interpreted as threatening was his comment "I'm not taking this shit." (Pl.'s Dep. at 213.) But, plaintiff continued, that "wasn't said in a threatening way so I don't see how he could take it as a threat." (Id.)

[10]In his deposition, Vonkchalee described his second encounter with plaintiff on 4 March 1997 as an encounter during which he felt plaintiff was engaging in threatening and intimidating behavior.

[footnote continued]

chalee Dep. at 43-47, 70-72, 74-75, Exs. 2 & 5; Blizzard Dep. at 28-31.) See *Holder v. City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989) (" 'A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination.' . . . Bad or mistaken reasons for a decision may yet be non-discriminatory.") (citations omitted); *Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452-1453 (11th Cir. 1987) (upholding jury instruction explaining that "if the employer fired the employee because it honestly believed that the employee had violated a company policy, even if it [were] mistaken in such a belief, the discharge is not 'because of race' and the employer has not violated §1981"). *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991), in which an ADEA plaintiff had been fired for allegedly sexually harassing his co-workers, is particularly instructive in its discussion of pretext:

> Much of Elrod's proof at trial centered around whether Elrod was in fact guilty of the sexual harassment allegations leveled at him by his former coworkers. We can assume for purposes of this opinion that the complaining employees interviewed by Rives were lying through their teeth. The inquiry of the ADEA is limited to whether Rives, Malone and Merrill believed that Elrod was guilty of harassment,

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(Vonkchalee Dep. at 30-33, 70-71.) After this meeting, Vonkchalee reported the incident to Roger Bone, and Roger Bone instructed him to inform Doug Blizzard. (Id. at 33, 35-36, 38.) Although Blizzard was unavailable at that time, Vonkchalee ultimately did inform him of plaintiff's threatening conduct that occurred on 4 March 1997. (Id. at 58.) Vonkchalee also testified that plaintiff said some threatening things about Roger Bone and Doug Blizzard on 12 March 1997, the day Vonkchalee finally issued the second level counseling to plaintiff. (Id. at 45, 54, 74.) Vonkchalee immediately communicated plaintiff's threatening comments to Bone. (Id.)

> and if so, whether this belief was the reason behind Elrod's discharge. . . . *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980 n.2 (11th Cir. 1989), cert. den[ied], 495 U.S. 935 . . . (1990) (That the employee did not in fact engage in misconduct reported to the employer is irrelevant to the question whether the employer believed the employee had done wrong.). Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (citations omitted). "[F]or an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory. . . ." *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1323 n.4 (11th Cir. 1982) (emphasis in original). . . .

Elrod, 939 F.2d at 1470-1471.

Like the plaintiff in *Elrod*, plaintiff has offered no evidence to show that Morganite's justification for his termination is unworthy of credence. The fact that plaintiff received a counseling based on allegedly threatening and intimidating behavior in January 1996 and that Vonkchalee reported additional intimidating and threatening behavior to Bone and Blizzard in March 1997 are uncontroverted. Unlike Elrod, plaintiff did not sign a document confirming that he had made the threats at issue, yet plaintiff has not challenged Bone's or Blizzard's belief that he made the threats at issue. Although

plaintiff may have made allegations in the course of these proceedings, which this court is bound to construe favorably toward him, that the allegations regarding his threatening and intimidating behavior were untrue, he has not presented evidence that Morganite's asserted belief in those allegations was unworthy of credence. Indeed, as evidenced by his affidavit, plaintiff suggests that he believes that the allegedly threatening behavior was actually the reason for his discharge. Accordingly, plaintiff has not begun to show that defendant's proffered reason for his discharge was pretextual as required by *St. Mary's* and *Reeves*, and his discriminatory discharge claim must fail.

B. Retaliation

Plaintiff alleges that his termination was the result of unlawful retaliatory conduct by Morganite and its supervisory and managerial employees. (Compl. ¶¶ 4(d) and 6.) It is unclear from plaintiff's complaint or his response to defendant's motion for summary judgment precisely what protected activities by plaintiff allegedly motivated defendant's retaliatory conduct. Plaintiff explains that he complained to supervisory and management officials about the discriminatory conduct he experienced at Morganite beginning in 1988 and that he continued to complain about such conduct through 1997 when he was fired. He also states that he began threatening to report Morganite to the EEOC and the NAACP sometime before 1992. (Pl.'s Dep. at 187.) He seems to suggest that Morganite fired him in 1997 in retaliation for the various complaints he made to defendant over a ten-year period. (Pl.'s Resp. at 26.) Specifically he suggests that, in February 1997, Morganite "lost its tolerance of [his] opposition to the discrimination and discharged him." (Id. at

27.) In his deposition, however, plaintiff acknowledged that his threats to go to the EEOC or the NAACP about the discriminatory conduct at Morganite could have played a part in defendant's retaliatory conduct, but explained that "the root cause [of the retaliatory conduct] was the interracial relationship" he had with a white woman. (Pl.'s Dep. at 186.)

An employer may not retaliate against an employee who has engaged in Title VII protected activity.[11] Nor may an employer retaliate against an employee based on the employee's opposition to an unlawful employment practice. See 42 U.S.C. §2000e-3. To prove a prima facie case of retaliation, a plaintiff must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity, (2) the employer took adverse action against him, and (3) there was a causal connection between the activity and the adverse action. See *Tinsley v. First Union National Bank,* 155 F.3d 435, 443 (4th Cir. 1998) (discussing prima facie case of retaliation under Title VII); Karpel, 134 F.3d at 1228; *Beall v. Abbott Laboratories,* 130 F.3d 614 (4th Cir. 1997; *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 365 (4th Cir. 1985), abrogated on other grounds by *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).[12]

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[11] "It shall be unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. §2000e-3(a).

[12] Plaintiff states that his retaliation claim is brought under Title VII and §1981. (Pl.'s Mem. at 26.) However, the facts upon which he relies to establish that claim involve Morganite's alleged response to plaintiff's continuous requests for reasonable accom-

[footnote continued]

"The series of proofs and burdens outlined in *McDonnell Douglas* apply to retaliation claims." *Karpel,* 134 F.3d at 1228; *Ennis v. National Association of Business and Educational Radio, Inc.,* 5m F.3d 55, 58 (4th Cir. 1995) (*McDonnell Douglas* scheme of proof applies to appropriate claims under the ADA). Under *McDonnell Douglas,* plaintiff must first offer evidence sufficient to establish a prima facie case of discriminatory retaliation. The burden of production then rests with the defendant to articulate a legitimate, nondiscriminatory reason for its action. If it does so, then the burden is upon plaintiff to prove that the asserted reason is a pretext for discriminatory retaliation. *Tinsley,* 155 F.3d at 442.

In is undisputed that Morganite fired plaintiff in March 1997. That termination constitutes an adverse action for purposes of this court's analysis of plaintiff's retaliation claim. Even assuming that plaintiff could show, by a preponderance of the evidence, that he engaged in protected activity, which this court believes is far from clear, the court cannot conclude that plaintiff has demonstrated a causal connection between any allegedly protected activity and plaintiff's termination. Plaintiff asserts that his termination, like every other aspect of his difficulties in working for Morganite, goes back to the conversation in 1987 during which Cooper allegedly expressed displeasure with and disapproval of plain-

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modations for his disabilities as well as the allegedly discriminatory environment. Accordingly, the court will consider the retaliation claim under the ADA as well as Title VII. The remedies available for a violation of the antiretaliation provision of the ADA in the employment context are set forth in 42 U.S.C. §12117. Section 12117 specifically makes the remedies available under Title VII applicable to actions under the ADA. See 42 U.S.C.A. §12117(a) (providing that "[t]he powers, remedies, and procedures set forth in section [ ] . . . 2000e-5 . . . of this title shall be the powers, remedies, and procedures this subchapter provides to . . .

tiff's relationship with a caucasian woman. (Pl.'s Dep. at 184-185.) When asked for the specific basis of his retaliation claim, plaintiff responded that "[i]t all dates back to – like everything else – dated back to the meeting with David Cooper about the interracial relationship. They were just going to show me that you don't come here with no white woman in our face and you're going to pay the price." (Id.) Presumably, plaintiff is arguing that his decision to disregard Cooper's suggestion that he downplay his relationship or have his girlfriend drop him off in the back of the building was protected activity, or at the least, opposition to discriminatory conduct.

As the Eleventh Circuit has held, "[f]or proof of the causal link, the plaintiff 'merely has to prove that the protected activity and the negative employment action are not completly unrelated.' *EEOC v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993), but the employee must at least establish that the employer was actually aware of the protected expression at the time the employer took adverse employment action against the plaintiff.' " *Malladj v. Brown*, 987 F. Supp. 893, 915 (M.D. Ala. 1997) (citations omitted), aff'd, 150 F.3d 1197 (11th Cir. 1998). First, plaintiff has not shown that his conversation with Cooper in 1987 and his termination were remotely related. Moreover, plaintiff has not suggested that Cooper had any input into the decision to terminate his employment, and Cooper has stated that he was not involved. (Cooper Dep. at 23.) The decision to terminate his employment is attributable to Roger Bone and Doug Blizzard. Plaintiff has not alleged that either Bone or Blizzard made any comments to him at any time about the race of his girlfriend. (See Pl.'s Dep., Ex. 12 noting that topic of plaintiff's relationship with white female was never again

raised by any Morganite management official). It is unclear whether Bone and Blizzard even knew about Cooper's alleged discussion with plaintiff pertaining to his interracial relationship. And plaintiff testified that he does not know whether Bone or Blizzard knew anything about his girlfriend's race and that he did not remember speaking to either of them about it. (Pl.'s Dep. at 268-270.)

More importantly, however, plaintiff was terminated in March 1997, approximately ten years after Cooper made the allegedly discriminatory remarks about plaintiff's interracial relationship in May or June of 1987. One indication of a causal connection between an adverse action and protected conduct is the temporal proximity of the events in question. "[C]lose temporal proximity gives rise to an inference of causal connectivity." *Dollar v. Shoney's, Inc.*, 981 F. Supp. 1417, 1420 (N.D. Ala. 1997). See also *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (six-week period between hearing on plaintiff's first EEO complaint and effective date of decision to downgrade him sufficient to establish prima facie case of retaliation); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, at 454 and 457 (4th Cir. 1989) (causal connection established where employer fired plaintiff within four months of the date complaint was filed). See generally, *Carter*, 33 F.3d at 460 ("[t]ypes of indirect proof to be considered in finding a causal nexus may include the temporal proximity of factual hearings regarding discrimination complaints as well as the actual date of filing"). The ten-year period between Cooper's allegedly violative conduct and Bone and Blizzard's ultimate termination of plaintiff's employment undercuts any argument that the two events could be causally connected. See *Tinsley*, 155 F.3d at 443 (period of 14 years separating plaintiff's

filing of a charge of discrimination and her termination by the Bank is far too long to raise an inference of discrimination); *Johnson v. University of Wisconsin*, 70 F.3d 469, 480 (7th Cir. 1995) ("the substantial lapse between the events is counter-evidence of any causal connection" where allegedly retaliatory actions occurred 16 and 20 months after opposition activities at issue); *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 110-111 (1st Cir. 1988) (no inference of retaliation where discharge occurred 33 months after plaintiff filed EEOC charge).[13]

Plaintiff's deposition may also be read to suggest that Morganite terminated him because he threatened to complain to the EEOC or to the NAACP about Morganite's treatment of him. (Pl.'s Dep. at 185-186.) Plaintiff testifies in his deposition, however, that he began making such threats to Morganite officials as early as 1992. (Pl.'s Dep. at 126-127.) As noted above, the passage of time between plaintiff's alleged threats to file charges against Morganite with the EEOC and the date of his discharge dispel any suggestion that he was terminated in retaliation for such alleged threats. Likewise, plain-

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[13] In *Tinsley*, the plaintiff argued that the district court erred in its consideration of her retaliation claim by focusing solely on the evidence that her 1993 termination was retaliatory and by ignoring her assertion of retaliatory harassment throughout the 14 previous years since the date she had filed an original charge of discrimination. *Tinsley*, 155 F.3d at 442. The *Tinsley* court rejected plaintiff's arguments, however, noting that it could find a continuing violation only after establishing the existence of a present violation, i.e., an actual violation of the statute occurring within the requisite time period. As in *Tinsley*, because the evidence is insufficient to sustain plaintiff's claim for retaliatory discharge, this court cannot consider any alleged instances of retaliatory harassment that occurred outside the scope of the limitations period. *Id.* at 443.

tiff's assertion that his resubmission of his request for accommodations for his disabilities in February 1997 demonstrated a retaliatory motive for defendant's termination of his employment in March 1997 is unpersuasive in light of plaintiff's testimony that he repeatedly requested such accommodations throughout his tenure with Morganite. Accordingly, defendant's motion for summary judgment on plaintiff's retaliation claim will be allowed because plaintiff has not established a prima facie case of retaliation under any of the statutes at issue in this action.

C. Hostile Environment

Plaintiff states anumber of bases for his hostile environment claim. First, he alleges that, when he was accused of and disciplined for engaging in threatening and intimidating conduct at Morganite, defendant's policies, which prohibited defendant from telling plaintiff whom he had allegedly threatened or what he had allegedly said, were harassing. (Pl.'s Mem. at 28.) He claims he was subjected to demeaning searches of his person, his personal effects and his car. (Id.) Plaintiff also alleges that he was subjected to a steady barrage of opprobrious racial and ethnic comments from Morganite employees and management officials. (Id.) Finally, Plaintiff argues that Morganite's denial of accommodations, promotions,[14] and training, as well as defendant's indifference

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[14] While plaintiff has suggested that defendant's general failure to promote him during his employment with Morganite was discriminatory, he has not provided any evidence upon which the court could evaluate such a claim. Plaintiff has not identified a specific promotion for which he applied, nor has he shown that other employees with lesser experience than himself were promoted for any specific position, nor has he provided any other

[footnote continued]

to his complaints about discriminatory conduct contributed to the hostile and abusive nature of his working environment. (Id. at 29.)

Title VII's proscription of discrimination with respect to conditions and privileges of employment on the basis of race, see 42 U.S.C. §2000e-2(a)(1), prohibits harassment so severe or pervasive as to alter the conditions of a plaintiff's employment and create an abusive working environment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). As the Supreme Court explained in *Harris*,

> whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

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comparative data. See *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994) (to prove a prima facie case of discriminatory refusal to promote a plaintiff who is a member of a protected class a plaintiff must show that he applied for a certain position for which he was qualified and that he was rejected under circumstances giving rise to an inference of unlawful discrimination). As such, the court cannot consider plaintiff's allegations regarding defendant's failure to promote him as a tangible employment action for purposes of the hostile environment analysis.

510 U.S. at 23 (Title VII does not require concrete psychological harm, and its prohibition of discriminatory conduct extends beyond that which seriously affects a reasonable person's psychological well-being).

> A prima facie case of hostile environment harassment requires that [plaintiff] set forth (1) unwelcome conduct by the defendant, (2) based on his race [and/or interracial relationship], (3) that "was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment."

Porter v. National Con-Serv, Inc., 51 F.Supp.2d 656, 658 (D. Md. 1998) (quoting *Spicer v. Commonwealth of Virginia Dept. of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995)), aff'd, 173 F.3d 425 (4th Cir. 1999). Under *Spicer*, a plaintiff must also show that the alleged hostile environment was imputable on some factual basis to the employer. See *Spicer*, 66 F.3d at 710 (discussing prima facie case in context of hostile environment sexual harassment); *Cosely v. E.I. DuPont de Nemours and Co.*, 1997 WL 856619, *6 (E.D. Va. July 24, 1997), aff'd, 139 F.3d 888 (4th Cir. 1998). The first and second elements are self-explanatory, and plaintiff has made allegations to satisfy those prongs of the prima facie case. With respect to the third element, an "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787; *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Booth v. N.C. Dep't of Environment*, 899 F. Supp. 1457, 1464 (E.D.N.C. 1995).

> A racially hostile working environment must be sufficiently severe or pervasive to alter the condi-

> tions of employment and create an abusive atmosphere. . . . The existence of a hostile environment cannot be predicated upon acts that are isolated or genuinely trivial. . . . An alleged victim of this type of racial harassment must also demonstrate that the employer had actual or constructive knowledge of the hostile working environment.

Carter, 33 F.3d at 461 (citations omitted).

Plaintiff's diary digest, which he submitted to the EEOC in conjunction with his charge against Morganite, details the many difficulties he encountered with various co-workers, supervisors, and management officials, particularly with respect to the accuracy of his yearly evaluations. Plaintiff acknowledges in his affidavit that he is a "strong-willed and outspoken person who . . . did not bow down to anyone." (Pl.'s Dep., Ex. 6.) While the many confrontations plaintiff beccame engaged in with various Morganite employees undoubtedly made his working environment more difficult and even unpleasant, these encounters cannot provide the basis for a Title VII claim because plaintiff has not shown that they were related, in any respect, to his race or ethnicity. His suggestion that all of the unfavorable treatment he received stemmed from Cooper's 1987 comment regarding his interracial relationship is unpersuasive as well as unsupported. Plaintiff's opportunities for advancement depended directly on his ability to score a certain number of points on his evaluations. He never scored the requisite number of points. Plaintiff's conclusory allegation that he was not given the requisite number of points because of the racial or ethnic animus of each of his various supervisors, is again, unsupported and unpersuasive. While plaintiff had a fair working record at Morganite, his evaluations over the ten years of his employment consistently show problems with productiv-

ity, and less consistently, with cooperation. See *Hawkins*, 203 F.3d at 281 (where plaintiff claimed that she received inadequate coaching, had to do work over and over, was unreasonably required to work late the night of an office Christmas party, and did not have access to the same work opportunities as other managers, plaintiff could not show employment difficulties were racial in nature). As the *Hawkins* court explained,

> Even if [plaintiff's supervisor] harbored some personal dislike of Hawkins that made Hawkins' job more difficult or stressful, "[a]n employer is not required to like his employees." *Cerberonics*, 871 F.2d at 457 (internal quotation marks omitted). And it is for PepsiCo, not the courts, to rule on the wisdom and generosity of [the supervisor's] management practices. Thus, in the absence of sufficient evidence of racial harassment, the district court correctly dismissed Hawkins' claims.

Hawkins, 203 F.3d at 281.

Plaintiff's allegations regarding the racial and ethnic slurs directed at him by co-workers, supervisors, and managers presents a discrete issue. First, only those comments made within the applicable limitations period are relevant to this court's analysis.[15] While plaintiff enum-

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[15] An aggrieved employee must file a charge with the EEOC alleging violations of Title VIIor the ADA within 180 days of the violative conduct. See 42 U.S.C. §2000e-5. In North Carolina, a plaintiff must bring a §1981 claim within three years of the allegedly discriminatory conduct. See N.C. Gen. Stat. §1-52. In his brief describing the various conduct he found to be discriminatory or harassing while employed at Morganite, plaintiff catalogues numerous incidents occurring over a period of ten years, often without providing any specific dates. For purposes of plaintiff's Title VII, ADA and §1981 claims, the court is limited in the events and occurrences it may consider. Accordingly,

[footnote continued]

erates several instances of harassing language directed toward him between 1987 and 1997, none of those instances appear to have occurred between November 1996 and June 1997. Accordingly, plaintiff could not establish a hostile environment claim under Title VII. See *Hawkins,* 203 F.3d at 281 n.2 (where Hawkins could not maintain a claim based on alleged events within the limitations period, there was no present violation to which any acts outside the limitations period could attach); *Tinsley,* 155 F.3d at 442-43 (continuing violation theory requires that at least one act of discrimination occur within the limitations period).

Plaintiff does assert that Roger Bone referred to him as Crazy Horse, Cripple Horse, Sitting Bull and Chief in or around January 1996. He also alleges that Bruce Muller, the former President of Morganite referred to him as Chief continuously. The remaining assertions are not accompanied by dates.[16] Even assuming, however, that

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the court will not consider any alleged discrimination occurring before 10 May 1996 for purposes of plaintiff's §1981 action, and the court will not consider any conduct occurring before 24 November 1996, 180 days before 23 May 1997, the date plaintiff filed his complaint with the EEOC for purposes of plaintiff's Title VII and ADA actions.

[16]Plaintiff alleges that in 1987, when he began working for Morganite and was informed by Cooper that people disapproved of his interracial relationship, a number of his co-workers harassed him in the mornings when he would arrive for work with his girlfriend. (Pl.'s Dep. at 253-354; Compl. ¶9c.) Plaintiff states that several co-workers made a point to be on the dock to observe him when he arrived for work. (Compl. ¶9c.) Edwin Ennis pounded his fist into his hand when plaintiff arrived. Larry West allegedly thumped a cigarette into his path, and Ennis and West "bumped" him on the walkways. (Pl.'s Dep., Ex. 12 at 2; Compl. ¶9c.) At some point Win Stephens made a comment to plaintiff that his wife would not sleep with a "nigger." (Pl.'s Dep. at 240.) On another occasion, West and Ennis allegedly showed plaintiff a polaroid picture depicting a KKK scene. (Pl's Dep. at 247.)

all of plaintiff's allegations regarding alleged racial and ethnic slurs are true and timely, the court finds that they did not create an environment "sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive atmosphere" as the Fourth Circuit has interpreted that language. *Id.*

> The Supreme Court has made it abundantly clear that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998) (internal citations and quotation marks omitted).

Patterson v. County of Fairfax, Virginia, 215 F.3d 1320, 2000 WL 655984, **4 (4th Cir. May 18, 2000) (where plaintiff alleged seven racial incidents spanning a seven-year period, court held that "[s]o few incidents of racially or sexually motivated behavior occurring over such a long period 'alone suggests the absence of a condition sufficiently pervasive to establish Title VII liability.' *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir. 1996) [, cert. denied, 519 U.S. 818 (1996)]."). See also *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 431 (7th Cir. 1995) ("The infrequency of the offensive comments is relevant to an assessment of their impact. A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage."); and *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) ("Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments."), cert. denied, 516 U.S. 826 (1995). The affronts at issue in this case, like those before the court in *Patterson*, though uncalled for, fall short of the consistent abusive conduct prohibited by Title VII. Moreover, plaintiff has not shown that the comments

at issue unreasonably interfered with his work performance.

V. ADA Claims

Plaintiff claims that his evidence shows that he "has a disability in the form of limited movement and endurance to his back and legs as well as chronic fatigue syndrome" and that his condition severely limited his ability to perform various tasks in the tool and die work room because he was primarily required to walk and stand while at work. (Pl.'s Mem. at 17.)

The ADA prohibits discrimination against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). To establish a violation of the ADA, plaintiff must show (1) that he has a disability; (2) that he is an otherwise qualified individual; and (3) that he has suffered unlawful discrimination based on his disability. See *Tyndall v. National Educ. Centers, Inc. of California*, 31 F.3d 209, 212 (4th Cir. 1994). The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual," unless the employer can demonstrate that the accommodation "would impose an undue hardship" on the operation of the employer's business. 42 U.S.C. §12112(b)(5)(A).

> The term "reasonable accommodation" may include –
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. §12111(9). Failure to make such reasonable accommodations constitutes unlawful discrimination based on a person's disability. 42 U.S.C. §12112(b)-(5)(A). While the ADA requires employers to make reasonable accommodations for their disabled employees, 42 U.S.C.A. §12112(b)(5), "[a]n employer is not obligated to provide an employee the accommodation he or she requests or prefers; the employer need only provide some reasonable accommodation." *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998).[17] Moreover, if an employee cannot demonstrate a disability within the meaning of the Act, the employer is not required to provide reasonable accommodations.

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[17] See also *Hollestelle v. Metropolitan Washington Airports Authority*, 145 F.3d 1324, 1998 WL 228199 (4th Cir. May 8, 1998) (an "employee does not have the right to select the accommodation of [her] choice"); *Schmidt v. Methodist Hospital of Indiana, Inc.*, 89 F.3d 342, 344 (7th Cir. 1996) ("Reasonable accommodation does not require an employer to provide literally everything the disabled employee requests.").

Defendant argues that plaintiff has not demonstrated that he is disabled within the meaning of the ADA. Under the ADA, a "disability" is defined as:

> (A) physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. §12111(8). Plaintiff argues that he has forecast evidence to establish coverage under each of these categories. (Pl.'s Resp. at 18.)

A. *An Impairment Substantially Limiting One or More Major Life Activities*

A "major life activity" is a function such as caring for oneself, breathing, walking, hearing, speaking, performing manual tasks and working. 29 C.F.R. §1630.2(i). Sitting, standing, lifting and reaching also are considered major life activities. See *Fjellstad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 948 (8th Cir. 1999); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); *Patterson v. Xerox Corp.*, 901 F. Supp. 274, *278 (N.D. Ill. 1995). (citing 29 C.F.R. §1630.2(i) App. for proposition that "sitting" is also a "major life activity"); *Spraggs v. Sun Oil Co.*, 215 F.3d 1337, 2000 WL 628186, **2 (10th Cir. May 16, 2000) ("Major life activities" include basic functions such as seeing, hearing, sitting, standing, walking, lifting, and reaching, as well as the broader activity of working and "the former are clearly differentiated from the latter in sequence and substance of analysis. See *Davoll v. Webb*, 194 F.3d 1116, 1135 & n.12 (10th Cir. 1999) (noting functional activities are analyzed first, and if no substantial limitation is found as to these, inquiry proceeds to work limitations, which

implicate an additional set of factors to be considered).").

A person is "substantially limit[ed]" in a major life function if a person is "significantly restricted" in his ability to perform those functions when compared to an "average person of the general population." 29 C.F.R. §1630.2(j).

> The following factors are considered in determining whether a person is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact. 29 C.F.R. §1630.2(j)-(2)(i)-(iii). Additionally, the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis. *Doane v. City of Omaha,* 115 F.3d 624, 627 (8th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S.Ct. 693, 139 L.Ed.2d 638 (1998).

Fjellstad, 188 F.3d at 949. Whether a person is substantially limited in a major life function must be determined in light of any corrective devices or medication that the person uses. See *Sutton v. United Airlines,* 527 U.S. 471, 488 (1999).

> The Supreme Court recently followed a three-step process for determining whether a plaintiff has a disability under the first subsection of the ADA's definition. See *Bragdon v. Abbott,* 524 U.S. 624, ___ , 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1988). First, it determined whether the plaintiff suffered from a physical or mental impairment. *Id.* Second, it "identif[ied] the life activity" upon which the plaintiff relied and "determine[d] whether it constitutes a major life activity under the ADA." *Id.* Third, it inquired whether the plaintiff's impairment "substantially limited" a major life activity

> identified in step two. *Id.* In order to be eligible to prevail upon a further showing of discrimination, a plaintiff must satisfy each of the three prongs. Thus, a plaintiff who showed that he had an impairment and that the impairment affected a major life activity would nonetheless be ineligible if the limitation of the major life activity was not substantial.

Colwell v. Suffolk Co. Police Dep't, 158 F.3d 635, 641 (2nd Cir. 1998), cert. denied, 526 U.S. 1018 (1999).

Plaintiff has claimed that his legs and back bother him, that he is in constant pain, and that he needed some reasonable accommodations to alleviate that pain while he was working. Plaintiff contends that "the pain, swelling and weakness [plaintiff] endured from his chronic fatigue syndrome, varicose veins, and back condition were impairments that substantially limited his ability to walk and stand for [ ] extended periods of time." (Pl.'s Mem. at 18, 19.) The case law suggests otherwise, however. See *Colwell*, 158 F.3d at 644 (where plaintiff had difficulty standing "for a long period of time," or sitting "for too long" at his desk without getting up and stretching, and his doctor testified that he was capable of light duty and could perform sedentary work so long as he could "get up" and "change position," that he could stand and walk for "maybe half an hour to an hour at a time," and that he was capable of working an eight hour day with limitations," neither plaintiff's testimony nor his doctor's supported the conclusion that plaintiff was "substantially" impaired in his ability to stand, sit, lift, bend, or reach as compared with the average person); *Rosa v. Brink's, Inc.*, 103 F.Supp.2d 287, 290 (S.D.N.Y. 2000) (court relied on *Colwell* to conclude that, where plaintiff could not walk or sit or stand for long periods without some undefined pain after sustaining back injury, the impairment of activities alleged was insufficient to

qualify for coverage under the ADA); *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997) (noting that cases make clear that moderate difficulty or pain experienced while walking does not rise to level of disability); *Horth v. General Dynamics Land Sys. Inc.*, 960 F. Supp. 873, 878 (M.D. Pa. 1997) (plaintiff did not fall under the statute although he was unable to sit or stand for more than two hours at a time, had difficulty walking and walked with a limp, had difficulty continually lifting objects over twenty-five pounds, was adversely affected by certain atmospheric pressure systems, and suffered from temporary total disability of several joints); *McCleary v. National Cold Storage, Inc.*, 67 F.Supp.2d 1288, 1300 (D. Kan. 1999) ("That he wears a leg brace and experiences pain with excessive standing or walking is not enough evidence to allow a reasonable juror to conclude that the plaintiff's capacity for walking or standing is significantly restricted.").[18] Plaintiff's allegations of physical discomfort, while unfortunate, do not rise to the level of a substantial limitation upon his ability to stand or walk.

The court will now assess the effect of plaintiff's medical conditions on the major life activity of work. Assuming that plaintiff has shown that he suffers from one or more physical impairments that affect his ability to work,[19] and that working is a major life activity under

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[18] See also *Murphy v. UPS*, 141 F.3d 1185 (10th Cir. 1998), aff'd, 527 U.S. 516 (1999) (controlled severe hypertension not disability); *Williams*, 101 F.3d at 349 (5% permanent partial disability to back causing 25 pound lifting restriction not disability); *Cody v. Cigna Health Care*, 139 F.3d 595 (8th Cir. 1998) (plaintiff's depression and anxiety disorders did not substantially limit her and were not protected disabilities).

[19] The EEOC's regulations implementing the ADA define an "impairment" to include any "physiological disorder, or condition" that affects (inter alia) the neurological, musculoskeletal, and cardiovascular systems. 29 C.F.R. §1630.2(h)(1).

the ADA, the court nevertheless must conclude that plaintiff has now shown that his back and leg problems or his chronic fatigue syndrome "substantially limit" his ability to work as that term is understood in the context of the ADA. With regard to the major life activity of working, "substantially limits" means that an impairment must significantly restrict an individual's ability to perform a wide range of jobs. *Halperin v. Abacus Tech.*, 128 F.3d 191 (4th Cir. 1997); 29 C.F.R. §1630.2(j)-(3)(i) (an inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working). While plaintiff reportedly experiences pain when he is working, he nevertheless is able to work and had excellent attendance as an employee of Morganite. Plaintiff has not shown that his ability to perform as a tool and die maker was significantly restricted, nor has he presented any evidence that his ability to perform a wide class of similar jobs was so restricted.[20]

B. *A Record of an Impairment/Being Regarded as Having an Impairment*

To satisfy either of the two remaining definitions of "disability" plaintiff must show that a record of such impairment exists; or that he was regarded as having such an impairment. The impairment that he must show to meet

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[20] *Jerina v. Richardson Automotive, Inc.*, 960 F. Supp. 106, 109 (N.D. Tex. 1997) (where doctor testified that plaintiff's chronic fatigue syndrome, depression, and panic disorder, interfered with his normal life activities and caused him to be temporarily unable to work under circumstances when he was confronted with and experienced extreme stress but failed to address whether he could perform a myriad of similar jobs, evidence was insufficient to support conclusion that plaintiff's ability to work was substantially impaired).

the second and third definitions of "disability," however, is the same impairment he failed to establish for purposes of the first definition, i.e., an impairment that substantially limits a major life activity. Accordingly, a record in the form of a "medical history of [his] ailments and his efforts to receive continuous treatment through the date of his discharge" does not constitute a record of an impairment that substantially limits a major life activity sufficient to satisfy the second definition of disability. Finally, plaintiff argues that he was regarded as having the described impairments because he constantly reported his ailments to his employer, because he refused to work overtime based on his ailments, and because Bone, a management employee, routinely referred to him as Crazy Horse or Cripple Horse. (Pl.'s Mem. at 18.) Again, this evidence simply does not establish that defendant regarded plaintiff as "disabled" within the meaning of the ADA. Plaintiff's inability to show disability precludes him from establishing a violation of the ADA. Because he cannot show that he was disabled within the meaning of the ADA, plaintiff cannot show that Morganite was required to provide him with reasonable accommodations as a matter of law, and his claim must be dismissed. Moreover, plaintiff's inability to demonstrate a "disability" within the meaning of the statute also requires the court to dismiss plaintiff's claim that he was terminated in violation of the ADA.

VI. Plaintiff's Motion to Amend

Plaintiff has filed a motion to amend his complaint to add state law claims for intentional infliction of "mental distress" against each of the originally named individual defendants in their individual capacities and possibly against Morganite itself. On 24 April 2000, how-

ever, after plaintiff had retained counsel, the court permitted plaintiff to amend his complaint to dismiss all claims against the individual defendants in this matter, and those defendants are no longer parties to this action. In any case, because the court will allow defendant's motion for summary judgment on plaintiff's federal claims, the court would decline to exercise supplemental jurisdiction over the proposed state law claims. See *Lane v. David P. Jacobson & Company, Ltd.*, 880 F. Supp. 1091, 1100 (E.D. Va. 1995) (declining to exercise supplemental jurisdiction over state law claims, including claims for intentional infliction of emotional distress, where court dismissed Title VII claims); 28 U.S.C. §1367(c) ("district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction"). Accordingly, plaintiff's motion to amend his complaint will be denied as futile.

VII. Conclusion

In summary, defendant's motion to strike is ALLOWED. Defendant's motion for summary judgment is ALLOWED, and plaintiff's action is DISMISSED. Plaintiff's motion to amend is DENIED.

This 5 October 2000.

/s/ W. Earl Britt
W. EARL BRITT
Senior United States District Judge

jmg/mi/jcd

APPENDIX C

EXCERPTS FROM DEPOSITION OF JAMES M. GIBBS, JR.

(March 16, 2000)

[32] point when he left out, Roger Bone drew me a picture after so much talk. He talked for a while, But he drew me a picture of the hierarchy of Morganite, and he drew one of the – the Washington Monument, one of the monuments in Washington, the tower. I think it's the Washington Monument, and he sectioned it.

He put David Cooper at the top, Roger Bone in the middle, and Glen Knight at the bottom, and then had my name underneath the base. He had David Cooper's name, which I didn't pay any attention to it, it had Cooper spelled with a K instead of a C. He had Roger K. Bone, which is his name, and he had Glen Knight. And I didn't pay that any attention until he highlighted – he highlighted the K in Kooper, highlighted the K in his middle name, and highlighted the K in Glen Knight's name, for KKK. And that was the problem I had with Glen Knight.

And the following day Glen Knight approached me to – for whatever reason. I don't remember exactly. But I wouldn't talk to him because of what was going on there in that situation, and he – walked away from him, and he followed me * * *

* * *

[63] lower part of my back. And I can't say that the other pain is not coming from that. I mean, that might be part of it too. But the leg pains, that's from vascular problems.

Q. And if I read the answers that we got here somewhere correctly, your vascular problems with your legs were first diagnosed and treated in 1976 - 77?

A. '78.

Q. '78?

A. Uh-huh (yes. And I had veinal ligation during that time.

Q. Back in the late '70s?

A. '78.

Q. And the back surgery that you mentioned earlier today, that was done in 1988?

A. 1988.

Q. Have you had any back surgery since 1988?

A. No, I haven't.

Q. Have you had any surgery on the veins in your legs since 1978?

A. Not since 1978, but when I was terminated from Morganite, that was in discussion already. That * * *

* * *

[79] seated position?

A. Oh, yeah, sure, uh-huh.

Q. Okay. Tell me about what other jobs?

A. Well, there were other jobs that required sitting. There were some jobs where you were doing some technical work at your bench, at your table, that you could sit and do. For instance, filing mold punches or something like that. You know, there were certain jobs that you could sit and do.

Q. In your job as a tool and die maker, did you ever have occasion to use the automated grinder that you described?

A. Yes, I did.

Q. And how about, did you ever have occasion to do the bench work that you were just describing?

A. Yes, uh-huh.

Q. What other times might there be an opportunity for a tool and die maker to sit while he was working?

A. It just depended on the job. I couldn't really go through the whole gamut of the particular jobs that you could, you know, sit, but there was several jobs that you could do.

It might only last 15 minutes; it might be a* * *

* * *

[98] was telling you about earlier.

Q. Let me show you, Mr. Gibbs, what has been marked as Exhibit No. 3 and ask you to take a moment to look at that and see if you recognize it?

A. Uh-huh, I do.

Q. What is this document?

A. This is the document I gave Doug Blizzard asking for accommodations.

Q. And the date on this is Feburary 19, 1997. Do you believe that was the date you gave it to Mr. Blizzard?

A. The date I gave it to him? No, it wouldn't have been the date I gave it to him.

Q. Do you know what date you did give it to him?

A. It was soon after this. It could have been the following day. It might have been two or three days. I'm not sure about that.

Q. Within a couple of days after February 19th?

A. I would think so. I can't really answer that, but it was within a few days of that. Sometime within a few days of that.

Q. Well, let me ask you this. You agree with me that you were fired from Morganite on March the 13th of * * *

* * *

[100] employment? The 8-hour days, right?

A. Yes, sir.

Q. You ask that instead of the scheduled three standard breaks – which we talked about earlier, right?

A. Uh-huh (yes).

Q. Morning, lunch, and then afternoon. Instead of the three standard breaks, could you break the longer of the breaks into two or three shorter breaks combining them with existing morning and late afternoon breaks. Were you ever allowed to do that?

A. No.

Q. During the breaks that you did have, that you were permitted to take at Morganite, were you able to sit?

A. You could do whatever you wanted to do.

Q. Then number three is, provide me with a constant rubber or similar floor mat that absorbs the pressure from standing on the concrete floors. Was that ever done?

A. There were floor mats there but first come, first served.

* * *

[146] worker or a postal – something postal worker. And at that, I wasn't going to listen to much of that. So soon after that I went to David Cooper's office.

Q. So you went back to David Cooper's office?

A. Well, I didn't go back to his office. Where I had talked to David in the first place was in the rest room. That was during the time that Russell said it would be an hour before I could see Roger Bone, and it just so happened that – I don't know who was in there first – but anyway we were in there at the same time, and I asked him could I speak with him about those problems.

And he asked me, he said, I understand that you're going to talk to Roger Bone, have you talked with him

yet? I said no. He said, well when you go talk to Roger Bone, then you come talk to me. Like a, you know, the pecking order.

Q. Okay. And so you're saying during the meeting with Roger Bone, you didn't even get a chance to talk to him specifically about the score on your review?

A. No. He started talking to me about me being an undesirable, and what he was saying, he saw me – you know, like all those types of things. Like I [147] say, it was a personal attack. One of many from him.

Q. During your meeting on January the 5th with Roger Bone, did you – and I know you told me that he brought up some of these things – but did you tell him or did you say anything about that you were something along the lines of, quote, a postal worker waiting to happened?

A. No. That's more like his words. I've never said anything about a postal worker. The first time I heard it was from Roger Bone. The second time I heard it from David Cooper. the third time I heard it was from Mon, and that was in a discovery from the Employment Security appeal.

The only time I ever mentioned anything about the post office was Mon and I were having a conversation at one time in his office about some of the things that were going on. We were discussing that, and he said that he – before we could further discuss something he had a meeting with Doug Blizzard and David Cooper to go over some things about me. And I made a comment something – I'm paraphrasing – a comment about, well, if you [148] go by what they have to say, one would think that my picture's on the post office wall.

And that's the only thing I ever said anything about post office, and that's how I quoted that to Mon. The next thing I heard about what Mon said that I said, was that I was something similar to what you just read to me, and that was in the discovery I got from Attorney Delaney in the ESC up here.

Q. So at no time ever during your employment with Morganite did you say to anybody that you were a postal worker waiting to happened?

A. No, sir. Not my style.

Q. In your meeting with Roger Bone on January the 5th of 1996, did you tell him that you had been raised to get even?

A. No, sir.

Q. Did you ever tell anybody at Morganite that you had been raised to get even?

A. No, sir. And speaking of that, I've read that. I also – the first time I read that was in the same discovery from the ESC appeal, and that's where I read that about Roger saying that. And he said in [149] that, that I had said something about coming out there to – the previous day or the previous week I'm not sure – to – I'm not sure if he said get even or – something. Take care of somebody or something.

Previous to that we all – it was the previous week because the previous week to that we were on vacation. And that he would like to say that, well, he made a mistake he meant this week. Well, the previous week to that we were also on vacation. So, you know, I don't understand where he was coming from with that. Like I say, I might be jumping ahead of you on that.

Q. How about in the meeting with Roger Bone on January the 5th of 1996? Did you say something along the lines of that you were going to take care of things your way?

A. No, sir.

Q. Or take care of things my way?

A. No, sir.

Q. At any time that –

A. My way of taking care of things was – I didn't verbalize that, but he should have understood my [150]

way of taking care of things. I'm going to the media, I'm going to the NAACP, I'm going to EEOC. That's my way of taking care of things.

Q. During you employment with Morganite, did you ever say to anybody that you had a friend in Fayetteville who knew how to bump somebody off, or you had friends in Fayetteville who could get somebody murdered or killed?

A. No. Not at all.

Q. Did you ever tell anybody that you had something in your bag that you brought with you to work that would take care of them?

A. No, sir.

Q. Did you ever –

A. And that was used more than once. That got to be old news there. Every time you turned around somebody was throwing that up.

Q. Did you ever tell anybody at Morganite that – well, let me strike that. Let me start again. Did you ever threaten Win Stephens?

A. No, sir, huh-uh.

Q. Did you ever tell Win Stephens that you knew where he lived or where his family lived?

[151] A. No, sir. I read that in the discovery. If anybody threatened anybody, it was Win Stephens threatening me.

Q. A slightly different type of statement, I guess, but did you ever say to any supervisor or manager at Morganite at time that you weren't going to take this shit?

A. What I said was, that I'm tired of this shit.

Q. Who did you say that to?

A. Mon.

Q. Other than to Mon, did you ever say something like that? I'm not go to take this shit, or I'm tired of this shit?

A. I've never said I'm not going to take this shit as far as I can remember. Like I said, I wouldn't mark a yes or no to that because I would have to refer to my journal and go through that to see if that was – I don't remember saying that.

I know I remember saying I'm tired of this shit. And I know the word shit was used here and there, but it wasn't out of anger. It was just like we're talking right now. You now, well, I'm not going to take this shit anymore, that type of [152] thing. It was not a raised voice thing or stomping around or nothing like that.

Q. In the 10 years or so that you worked at Morganite, in your view do you believe you ever did anything that anybody at Morganite could have perceived as threatening?

A. Yes, sir.

Q. Tell me what that was?

A. Threatened to go to EEOC or NAACP or whatever.

Q. Fair enough. Let me rephrase that. At the time you were at Morganite, during the years you were at Morganite, did you ever do or say anything that you believe could have been perceived by somebody else as threatening of violence of physical violence?

A. No, sir.

Q. Nothing ever?

A. Nothing.

Q. Now, shortly after your meetings with Roger Bone and David Cooper in January of 1996 David Cooper asked you to see a psychologist for an assessment?

A. Yes, sir.

Q. And you went?

A. Yes, sir.

[153] Q. And the psychologist, after you met with her – and I know there was some – it took you a little

getting to, to get together because of payments and stuff they had to get from Morganite.

A. Right. And one day – one schedule it snowed on that day, and she couldn't get in.

Q. But you finally did see her?

A. Finally saw her.

Q. Ann Smith?

A. Ann Smith, right.

Q. When you finally did see her, how long did you meet with her?

A. I couldn't say because I met with her several times. I met with her a couple, three times, and I couldn't say. It was – we went through a pretty exhaustive, you know, conversation and question-and-answer thing, that type of thing.

Q. If you know, did you see her on three occasions before she sent that letter to Morganite saying that you weren't threatening, or was that –

A. I couldn't say three or however many times it was. When she sent the letter to Morganite, that was post meeting with her.* * *

* * *

[165] the bottom?

A. Well, that's not the only protest I wrote. They allowed me to take this home with me overnight, and I don't know if you have it, but I sent a three-page protest along with it.

Q. So you went home and prepared a separate three-page protest letter that you gave to Morganite?

A. Exactly. And I asked that it – as a matter of fact, I mention it here in my statement down here.

Q. "I have presented you a three page letter dated 1/17/96," right?

A. Uh-huh (yes). "That I would like to accompany this signed memo." And it goes through every step of step by step, paragraph by paragraph.

Q. Now, in early 1997 the next year, Mr. Vonkchalee, Mon Vonkchalee, gave you a performance evaluation?

A. Yes, sir.

Q. If you'll look back for a moment at Exhibit No. 9, please.

A. Uh-huh (yes.).

Q. It's the last page of that exhibit, I believe, the last review in there.

A. Uh-huh (yes).* * *

* * *

[195] to schedule my vacation time, the remaining part of my vacation time with him, and during that meeting I also brought up that for following year I'd like to put in for some time off on the first Monday of every – using personal paid time. We had –

Q. The first Monday of every month?

A. The first Monday of every month.

Q. All right. Go ahead, I'm sorry.

A. Because we had a – something called personal paid time that was time that you could use at your own discretion for whatever reason as long as you got permission to do so.

Q. All right. So how did that converation with Mon go?

A. As far as that, I told him that I'd like to have it, and he agreed and he said fine. He said no problem. That's not his exact words, but basically that's how it ended. He made a note about it.

Q. Did you say anything to him about how much time – so the first Monday of each month?

A. Uh-huh (yes).

Q. Did you say anything to him about how much time you would need off on these Mondays?

[196] A. Yes, sir. I told him it shouldn't be over four hours, and I told him it would probably be under four hours. It would probably be far less than that in some cases, but I said it would be probably three or four hours most likely.

Q. And was the agreement that you would be able to come in three or four hours late or take off early on Mondays, the first Monday of the month?

A. Come in late.

Q. What was the purpose of that? Why was the first Monday of each month a day that you needed to be able to come in late?

A. Well, it had to do with I had an outside relationship, and that was more of a rendezvous.

Q. Say it again. That was more?

A. It was a personal thing actually, something personal. I'd rather leave it at that.

Q. It was a personal having to do with your relationship with Ms. Brown?

A. No.

Q. Did you explain to Mon what the reason was that you needed this time off on Mondays?

A. It wasn't required. It was personal so I left it

* * *

* * *

[201] Q. Okay.

A. That was the only requirement that Mon asked of me for doing that.

Q. When you came in on that first Monday in March of 1997, what happened?

A. I went to the toolroom. I came in the back door so I could go into Mon's office. I came to it before I came to the toolroom. I was going to stop by there and let him know I was there, but he wasn't in. So I went on to the toolroom and put up my bag and put my lunch in the refrigerator, that type of thing, and then went looking for Mon. Somebody said he was in the front – up front, and when I went up there, he was in Roger Bone's office.

Q. So you found him? You found him in Roger Bone's office?

A. Yes. And I tapped on the door to let him know, but I was waiting for Roger Bone to allow me to come in or whatever, you know, but I didn't actually go in. When he allowed me to speak, I told Mon, I said, I'm here.

Q. Then you did go on to the toolroom?

A. I went back to the toolroom. * * *

* * *

[206] together. He went right to Doug Blizzard; I went left down the hall towards the toolroom.

Q. And at that point everything's cool?

A. Everything's cool.

Q. At some point did Mon come to you and say I have to issue you a written counselling or a written warning for you being late this morning?

A. The following day.

Q. So that –

A. Well, actually – let me say this – he had told me that in the conversation outside on the curbing. That Roger Bone had said that I was going to get a second-level counselling for that.

Q. For coming in late?

A. Right. Roger Bone heard me tell Mon why I was

there. So I don't know if he and Roger discussed it at that point or if Roger wanted to know what was going on or whatever. But anyway, when I came back up there, that was part of the conversation. And that's when I told him well, you know, you told me that I could be off on the first Monday, and that's when that part occurred.

Q. And he slapped his head and said oh, yeah, now I [207] remember?

A. Yeah. I think he used the word damn, said damn, I forgot about that or something like that. Something on those terms.

Q. So did you part company with Mon? As you walked back into the building, when you parted company with him, was it your understanding that you were not going to get a write-up?

A. Of course, uh-huh.

Q. That Mon would take care of whatever concern Roger Bone had?

A. Correct.

Q. Now on Tuesday, the 4th, or the next day –

A. The next day.

Q. – Mon comes to you and says I've got a – what, does he call you to his office?

A. He called me to his office. I was working in the toolroom and he passed and said – I'm not sure of his exact words, but it was like how about coming with me to my office, and no reason was given or anything. And then as we passed through the toolroom, Phillip's desk was there, and he asked Phillip to join us. And so we went out to Mon's [208] office, the three of us.

Q. You, Phillip and Mon?

A. Yes, sir.

Q. So you went to Mon's office. What happened once you got in the office?

A. After first going in there, he told me that he was having to give me – he had to give me a reprimand for what happened yesterday.

Q. For being late?

A. Yes, sir.

Q. What was your reaction?

A. Now, I'm not sure if that's the exact words or whatever. There might have been some words before that. But my reaction was I'm tired of this shit.

Q. Did you say that?

A. Yes, I sure did. As a matter of fact, he wanted me to sign it, and I said – and I didn't say it out of any hostility or anything. I said it just like I'm talking to you right now. I said I'm tired of this shit. Meaning that I'm going to do something about it with the EEOC, NAACP. My same threats as I've made before. And I said I'm not signing any damn reprimand, and so I turned and walked out.* * *

* * *

[210] notification, you know. That's what that was about, and that's the purpose for me going back to his office, and we talked at that point.

And something you asked me did I say at some point, and I said it didn't happen at that time. Would you repeat that in this last question?

Q. Yeah. I had asked you, at some point in time – it sounds like it's going to come up here during the second sit down with Mon on Tuesday.

A. Okay. And what was that?

Q. Did he at some point take the counselling form he had prepared and either crumble it up or tear it up and say okay. I'm not going to give it to you?

A. I think he crumbled it up and threw it in the wastebasket.

Q. Okay. Tell me about the conversation the second time you went into the office with Mon. What led up to him crumbling that counselling up?

A. We were talking about that particular problem, and at some point he said that – whatever our conversation was. Like I say, I can refer to my journal and tell you exactly what we said. But at some point he said that he would get this thing [211] straight, and he realized he was in the wrong about that and that he would take care of it and he balled it up and threw it in the trash.

But there was more to the conversation than that, but like I said, at this very moment off the top of my head I can't – but it was a mutual conversation, no hostilities or nothing. It was just talking.

Q. During this second conversation with Mon in his office, when you came back, was Phillip Bowden in there at that time?

A. No, sir.

Q. Just you and Mon?

A. Yes, sir. Mon was in there when I went and knocked on the door.

Q. During the second meeting with Mon on that Tuesday, did you tell him – did you say to Mon, quote, if they want to fire me go ahead and fire me. They already know what's coming to them. I came to work prepared today because I knew this was going to happened, close quote?

A. No, sir.

Q. Did you say anything like that?* * *

* * *

[215] said that's cool, and I turned around and left.

Mr. McGuire: Can I get that marked as number 14.

A. He had said that Doug Blizzard and Roger Bone had – I don't know what the correct word would be. But anyway, through their efforts is why he had to give it to me.

Q. He did, in fact, show you a written co nselling form that had been filled out?

A. No, sir. No, he didn't even show it to me. He just said I know that you said that you're not going to sign it so, you know, all I'm doing is telling you that I'm going to have to give it to you, and I said that's cool and turned around and walked out.

(Thereupon, Deposition Exhibit No. 14 was marked for identification.)

Q. Mr. Gibbs, let me give you what's been marked as Exhibit No. 14 to your deposition and ask you to take a moment to look at that document, please.

A. Okay.

Q. Do you recognize that document?

A. I recognize it from the discovery during . . .* * *

* * *

[217] that day?

A. Yes, sir.

Q. Tell me about that.

A. At some point when I was filling out my time cards and that type of thing, Mon came in, and I asked him about what was going on. I thought he had taken care of things.

As a matter of fact, backing up a little bit, on the day that – back on the 4th when he said he was going to take care of things about the particular reprimand, he came

back through the toolroom and told me that he had taken care of everything, everything was taken care of, and he patted me on the shoulder, and then he shook my hand and went on. And there was a witness to that standing there.

Q. Who was that?

A. Gary Matthews.

Q. Okay. Returning –

A. And getting back to – okay.

Q. Returning to the 12th, though, March the 12th. You went to see Mon. He's in his office working on time cards you said? * * *

* * *

[219] at 6:00. And I told him to have a good night or a good evening or whatever and went on and that was it.

Q. At any point after he told you he was going to give you the counselling and you left him and told him that's cool on the 12th, at any point later in that day did you talk to him again about the counselling that he had given you?

A. I asked him what it was all about. I thought he had taken care of it. And he told me that Roger – again he reaffirmed that Roger and Doug had, the way it sounded, had sort of twisted his arm to do that. And at some point earlier, the second time I went to his office when we were discussing – I just thought of that – that he said that if he didn't do it, that Roger Bone would have his ass in a sling.

Q. So you did go to his office later that day again and sat down and talked to him?

A. No. I'm just backing up to the second visit to his office.

Q. On the 12th?
A. On the 4th. * * *

* * *

[240] Q. Can you be more specific?

A. There was an occasion where we were talking about an engine I had for sale, and he brought up the subject of the price being too high – both of us own Volkswagons – the price being too high, that he wouldn't give me that price even if I threw my girlfriend in.

My girlfriend's name came up, and at the point of that he said something about if – within the conversation of something about if my girlfriend would ever go out with him that she never would speak to me again or – and I said something about – since he brought up the subject, that's not my way of talking, but I said that can also apply to your wife, and he said my wife wouldn't be caught with no Goddamn nigger or caught in the bed with no Goddamn nigger.

Q. What about Mr. Larry West? The complaint alleges that you were subjected to a hostile work environment based on your race and retaliation. What did Mr. West do, if anything, to contribute to that?

A. He was one of the initial ones that – before the [241] meeting with David Cooper he was on the ramp out there viewing Carmen and I. He thumped his cigarette at me.

Q. Now, you say he was standing up there. Can you explain in a little bit more detail of what you heard?

A. Well, he and Edwin Ennis were standing on the ramp. That was on a second day that Carmen had carried me -- because I was having car trouble – carried me into Morganite, and they were standing on the ramp on the second day. Standing there giving us the once over.

And when I approached them, Edwin Ennis was pounding his fist in his hand looking at me, and Larry West – well, I spoke as I passed them, and Larry West thumped his cigarette across. He flipped it. He was smoking a cigarette, and he took it and flipped it across to the floor in front me.

Q. What did you perceive his action to mean?

Mr. McGuire: Objection to the form.

A. Continue?

Q. Yes.

[242] A. He'd seen Carmen and I together, she being white and me being what they considered black or Indian or whatever.

Q. So it was your interpretation that his actions were based on his reaction to –

A. To the race issue.

Q. What about Russell Lee?

A. He carried out the – what David Cooper and Roger Bone – their racism towards me. He was in concert with them, carrying out their – on my reviews, in my chances of a promotion, or in chances of doing whatever it takes to get a promotion. And that all stemmed back to the racial issue of the interracial relationship.

Q. Now, you say he carried on their, their being who?

A. Roger Bone and David Cooper.

Q. What specific did he do, Russell Lee do?

A. There was never – he never would allow me any chance to advance. He was part of the meetings with David Cooper and Doug Blizzard during the 1996 issues.

Q. Well, did he participate in the last-clear-chance agreement, that January 1996 agreement?

* * *

[247] Q. Okay. Let's go back to Edwin then. What are those other things?

A. Pictures I was shown.

Q. What type of pictures?

A. Klan pictures.

Q. Be more specific, please.

A. A magazine he and Larry West was looking at with a Polaroid picture inside it. A picture of a – a Klan pictured covered over with George, Mon and my picture in a magazine at Morganite.

Q. Who had possession of that, Mr. Ennis?

A. Ennis.

Q. This was something he showed you?

A. Yes, sir.

Q. What was the purpose of him showing it to you?

Mr. McGuire: Objection.

Q. Do you know what the purpose of him showing it to you was?

A. Intimidation. One of the purposes.

Q. Doug Blizzard – I'm sorry. Mon Vonkchalee?

A. He was just in concert with Roger Bone just as Russell Lee was,carrying out their mandate or whatever it was.

* * *

[252] A. Yes, sir.

Q. Can you tell me who and when?

A. Bruce Muller as far as Chief, and all three of these terms as far as Roger Bone.

Q. Can you tell me when they said it?

A. The Crazy Horse had to do with when I reported to him in 1996 when I first went on Paxil, which was the antidepressant. When I reported to him that the doctor had put me on that – which is something you had to report, if you're on medication – he referred to me as Crazy Horse in terms to my –

Q. He being who?

A. Roger Bone. He made it, he didn't know whether to refer to me as Crazy Horse or another chief's name. I think he referred to Cripple Horse because I was having problems. He always referred to me as Cripple Horse as far as my physical impairments. And when I told him about the Paxil, he said he didn't know whether to call me Cripple Horse, Crazy Horse.

And the Sitting Bull was a reference – he and I were in the rest room, and I was in the stall sitting on the stool and another person came in, * * *

* * *

[261] much.

Q. He kind of flicked it?

A. Uh-huh (yes). Flicked it across to the ground in front of me. It didn't strike me, but it was close enough.

Q. Standing on the ramp there on that day, what did Mr. Ennis do?

A. Pounded his fist into his hand like that.

Q. Did he say anything?

A. No, just looked at me. They just looked at me. I spoke as I passed, and neither one of them said anything. When Larry flicked his cigarette, I stopped out of reaction and faced him and continued on into the building.

Q. After that day, did Mr. West or Mr. Ennis at any time during the remaining years of your employment with Morganite ever say anything to you about the race of your girlfriend or the fact that you had an interracial relationship?

A. No, sir, Not in words.

Q. And Russell Lee, did he ever meet Carmen Brown?

A. You'd have to ask him that. I don't know.

Q. Were you ever present when Carmen Brown met Russell * * *

* * *

[266] you Chief, used the term Chief –

A. Several times.

Q. Several times. What was the latest of those conversations during your employment? What was the date of the last one?

A. I know he did it in 1996 because I had a meeting with him – with he and Doug Blizzard following the 1996 incident about where they made me sign the two copies of the Terms of Continued Employment. I asked for an appointment to meet with Bruce Muller.

It was denied at the time, but in following months the meeting came about. And during that conversation I was referred to as Chief, and that was one of the later dates. And it's possible it was mentioned after that.

Q. By Mr. Muller? Did you have other meeting with him after that one?

A. I didn't have a meeting with him, but I had plenty of contact with him. I mean, it could just be a thing in passing, and he would call me Chief. And he would say it, and he would drag it out like, hey, Chief, you know, or something like that. He would drag it out, like, in a derogatory way. [267] That's the way I perceived it because it was like a joke to him.

Q. Did you ever hear Mr. Muller call anyone else Chief?

A. I didn't hear him call anybody Chief, but I know that he referred to Oriental people as the little slant-eyed people walking around, surveying the plant,

Q. You personally heard him say that?

A. I didn't personally but I have witnesses that can verify that.

Q. Who are those witnesses?

A. People that were in that particular meeting at the time.

Q. Name those folk for me?

A. James Brannon.

Q. James?

A. James Brannon, uh-huh. There's a lady – and both of these people are – James Brannon, his father's Caucasian, his mother is Vietnamese. There's a lady that was either Vietnamese or Korean. Her last name I don't know; her first name is Sue. She worked in the built-up coms area.

* * *

FAYETTEVILLE DIAGNOSTIC CENTER, LTD.
1767 Metromedical Drive
Fayetteville, North Carolina 28304
Telephone: (919) 323-2209

IMAGING REPORT

DATE: OCTOBER 12, 1992

PATIENT: GIBBS, JAMES CHART #8228

DATE OF BIRTH: 8-5-43

REFERRING PHYSICIAN: RIVERS, REUBEN

EXAMINATION: CHEST

Indication: Follow up.

Frontal and lateral views of the chest were obtained and compared previous exam dated 7-2-91. No significant interval change is see heart is not enlarged. The central pulmonary vascular markings ap slight prominent. Slight increase in the retrosternal air space a flattening of the hemidiaphragms suggest a mild underlying emphyse configration to the chest. Adjacent to the seventh and eighth right ribs is what appears to be some underlying pleural thickening vers folds. This was present on the previous examination and has not c. The bony structures are unremarkable.

IMPRESSION: No evidence of acute disease or significant change si prior exam.

/s/ P.W. Zellner
P.W. Zellner, M.D.; Radiologist
pwz/mrh t:101292pm

[Defendant's Exhibit 2]

Tuesday, March 4, 1997

Morganite, Inc.

This is a report on an incident on Monday March 3, 1997 between Mon Vonkchalee and James Morgan Gibbs with Phillip Bowden present for a short period of time.

Today I discussed a break in policy with an employee, Morgan. He did not call in within 1 hour of his working schedule.
I asked Morgan Gibbs to come to my office.
I asked Philip Bowden to be there as a witness.
I started out by telling him what we already talked about yesterday.

Yesterday March 3, 1997 I talked to him about his "NO REPORT"

He told me that he could not get up due to his Migraine Headache with a tunnel vision. He could not call in, all he could do was shut his eyes and go to sleep and try to stay still until his girlfriend came back from the store with a prescription medicine. After he took the medication, he rested and an hour later he felt he was able to drive to work. He got to work about 9:00 AM.

I asked him yesterday why couldn't his girlfriend call for him.

He said it shouldn't matter because it was a medical emergency. He also told me his girlfriend has problems with Morganite. He has told her many bad things about Morganite, she doesn't want to have anything to do with Morganite.

I asked him, how do you want me to handle this because I have to do my job and you already know what will happen, you already know the consequences for calling in late, this will be a second level counseling, which means that two more NO REPORT within one year he will be discharged.

I explained that to him and he said,

"Well, you do what you have to do and I will do what I have to do, I already had my final counseling, and Morganite will not fire me. Firing me is the last thing morganite going to do. I'd rather be in an electric chair."

I asked him "What do you mean by that"

"Well Morganite has always treated me wrong and I will not take this shit from anybody." He explained himself further by saying that he already told Morganite Management, from the President, Vice President, Managers, and his previous Supervisors of what what going to happen if Morganite fire him.

He also mention one incident that he had with Win Stephens.

He told me that he found out that Winn Stephens, an Engineer, told someone that Morgan had a gun in of his back pack so he also threatened Winn, saying that he would hurt Win.

[Defendant's Exhibit 3]

March 4, 1997

Subject: No report from Morgan Gibbs on 3-3-97

I spoke with Morgan Gibbs (with Phillip Bowden sat-in as a witness.) about his failure to report in to his supervisor of being 3 hours late.

(Myself Mon Vonkchalee).

I'd asked Morgan to explained his situation. Morgan said that he had a migraine headache – so badly that he threw-up and couldn't get to the phone. (His girl friend had to go get prescription from the drug store?). An hour after he took the medicine, he was be able to drive to work, and still have the Headache

I also asked Morgan, why didn't his girl friend call in? His explanation was that his girl friend doesn't want to have anything to do with Morganite, Inc, and he had many problems with Morganite, Inc. (Referred to Bruce M, D, Roger B, Bert J., Russell Lee, Win). Morgan asked me to understand his circumstances and situation. I agreed to treat this case as a medical emergency. And I asked him to call in next time, before his headache get any worse – He agreed to try to do better on reporting of being lateness and absence. Considering this is the first time for me to deal with this, I had to agree with Morgan and treat this as a unique situation.

Signed

/s/ Mon Vonkchalee

3-4-97

EXCERPTS FROM DEPOSITION OF RUSSELL LEE

(May 4, 2000)

[29] Q. So then you mislead him as to who it was?

A. I don't know that I – I didn't tell him who it was not or who it was. I didn't tell him that it was Glenn Knight.

Q. You specifically told him it wasn't Glenn Knight?

A. In the memo?

Q. Yes, sir.

A. In this one right here?

Ms. Berdahl: Objection. He didn't write that memo.

Q. Let me ask you, did you – to the best of your recollection you're saying –

A. I did not tell him it was not Glenn Knight or Glenn Knight. I didn't tell him who it was.

Q. But you did discipline him for it?

A. Yes.

Mr. Locus: No further questions.

EXAMINATION

BY MS. BERDAHL:

Q. Mr. Lee, you did tell Mr. Gibbs the content of the threat?

A. Yes.

Q. And you told him the circumstances of the * * *

* * *

[Defendant's Exhibit 8]

MORGANITE INCORPORATED

EXHIBIT IV – RECORD OF CORRECTIVE ACTION

___ 1st Level Counseling
___ 2nd Level Counseling
_X_ Final Counseling
___ Discharge

EMPLOYEE NAME: James Morgan Gibbs
CLOCK #: 332
SUPERVISOR NAME: Russell Lee
DEPARTMENT: 03-650
DATE FOR PREPARED: 1/12/96
DATE OF OFFENSE: 1/4/96

1. Circumstance necessitating this action: Situation arose week of January 1, 1996 making statements of a threatening nature, directed in genral toward Morganite Inc. employees.

2. CORRECTIVE ACTION EXPECTED BY SUPERVISOR (Specify applicable follow-up dates - any possible subsequent action).

As you are aware this is not acceptable action by employees. Any reoccurrence of any sort resembling this action will result in immediate discharge. See Attachment.

3. EMPLOYEE EXPLANATION/RESPONSE_____

_____

_____

Employee Date

Russell Lee 1/12/96

Supervisor Date

Roger K. Bone — 24 Jan 96

Manager — Date

(Written Reprimand/Discharge)

Vice President — Date

Human Resources — Date

EXCERPTS FROM DEPOSITION OF DOUG BLIZZARD

(May 4, 2000)

[20] Q. So then in January of 1996, you're saying that Mr. Gibbs – let me ask you this question. What was the basis for this being issued to Mr. Gibbs?

A. The fact that – from what I recall and from reading the stuff, you know, all the files y'all got and sent me, the issue was that Morgan had gotten a review from Russell Lee, and he was upset with one of the – one of the factors in that review. And in a discussion with Mr. Bone, he had made several comments about being a postal worker, about he was going to sit in the parking lot and blow people away, and things like that. And that was the impetus for this.

Now, in the course of that, apparently some other people came out of the woodwork for whatever reason and made comments that they had been . . . But again, so there was nothing I could do there. In fact, Roger who is a plant manager is saying, "I met with Morgan. He said these things." And so that's what this was given for. That's my recollection.

Q. So you weren't aware of any other threats he made besides the one from Roger Bone?

A. For this thing, right.

Q. So did you ever talk to anyone else besides Roger Bone? Well, did you talk to Roger Bone? First let me ask you that question.

* * *

[26] Q. Did you ever ask Mr. Gibbs if he was under the care of a psychiatrist?

A. No. I didn't, no.

Q. What is Human Resources' responsibility for investigating these types of issues?

A. These types of issues? In this specific case?

Q. In this specific case, yes.

A. There really wasn't much to investigate.

Q. Why?

A. Well, when you have a plant manager that comes to you and says, "I met with this employee, and he said these things," there's really – I mean, I mean, that's – he's the plant manager. He's the top site official on that side of the street.

Q. So because of his authority, that's it; there's no investigation done?

A. What else am I supposed to do? It was a one on one conversation. Morgan would probably deny it, but this is the plant manager, and I had no power over him. I couldn't . . .

Q. Couldn't still conduct an investigation or at least ask Morgan what his reaction was to it?

A. At this point, like I said, when this happened, it was nothing more I could do.

Q. I just want to make sure. So there was nothing* * *

* * *

[30] A. Uh-huh.

Q. Did he come with Roger?

A. Yeah, uh-huh.

Q. Do you know what day this was?

A. No.

Q. Now, did Mon talk to you about – do you know what day that was on?

A. It was four years ago. I don't know.

(Plaintiff's Deposition Exhibit #17 was marked for identification.)

Q. I'll show you Plaintiff's Exhibit #17.

A. Okay.

Q. This Exhibit #17, is this your recollection of what Mon told you?

A. Uh-huh.

Q. Now, this was regarding – what date did this occur?

A. March 11th.

Q. Well, if you would, read the first two sentences of it, please.

A. Talked with Roger and Mon today. I guess I talked to Roger and Mon today concerning an issue of Morgan Gibbs. Mon said that on March 3rd, he tried to give Morgan a second-level counseling for not calling in.

Q. Okay. Now, based on that conversation, your* * *

* * *

[47] objection. That's mischaracterization.

Mr. Locus: Let him answer the question, though.

Q. With Win Stephens –

A. I don't remember the exact comments. I do remember the nature of the conversation, which I've already explained to you.

Q. With Win Stephens you didn't. With Glenn Knight you did, but not with Win Stephens.

A. I gave – I think the record would show I gave you some examples of both.

Q. Well, refresh my memory because I don't recall it. What did you say that Win Stephens said that was threatening?

A. That Mr. Gibbs had told him he had things in his, quote/unquote, bag that would take care of him or any other employee.

Q. Did you ever at any time tell Mr. Gibbs about these threatening comments?

A. I mentioned that there were threatening comments. I never mentioned who they were from.

Q. Did you mention what the comments were?

A. No, I did not.

Q. So Mr. Gibbs did not know who made the comments? Mr. Gibbs didn't know what the comments were?

* * *

[54] brought him in and sat him down and told him, "I'm not going to answer this"?

A. Right. I probably didn't go through the entire document with him, but particularly on paragraph one where he said who, what, when, where, I said I will not divulge that.

Q. So then how was he supposed to discuss with you the validity of his issues?

A. I have answered those questions I think to the best of my ability.

Q. Is it not the company's policy that you investigate harassment?

A. Yes.

Q. Wouldn't an investigation mean to look at both sides of the issue?

A. That's correct.

Q. But how is an employee going to be able to participate in an investigation that you're conducting per company policy if he doesn't know what it was that he was saying?

A. He – we had had this discussion prior to this and the fact that he had said this is – he and I had the conversation about his performance review. I had the supervisor's opinion. He gave me his opinion. And any policies he'd like to review, the policies were available to [55] him, that a supervisor would sit down and go over them with him.

Q. I don't know if you answered my question. It's your responsibility under the company policy to investigate?

A. That would be – I would not always do the investigation.

Q. But somebody within the company would do this investigation; am I correct?

A. Generally if there were a charge of sexual harassment, that kind of thing there, I would say the HR group would generally take the lead in that investigation as a – as a party who was not . . . I mean, I was directly involved in this situation. And so, therefore, I would not have been the best person to do an investigation.

Q. So who actually conducted the investigation in this case?

A. I don't – I don't remember.

Q. Did you consult with whoever it was that conducted the investigation?

A. There again, I don't recall if an investigation was done and what the outcome of that was.

Q. But you were the one that was responsible for issuing the last chance; am I correct?

A. Excuse me?

Q. You were the one that was responsible for ***

* * *

[66] Q. Your previous testimony was that Mr. Gibbs never complained to you about discrimination. I'll show you again Plaintiff's Exhibit #10 and ask you could you read the highlighted red part?

A. I am concerned that there exists an atmosphere and climate of retaliation, threats, harassment, intimidation, and discrimination at Morganite because of my

personality, and/or documented physical disabilities, and/or race, and/or age.

Q. Was that included in the letter Mr. Gibbs sent you?

A. Yes, it was.

Q. Was there any action taken to investigate his concerns or allegations?

A. That was passed onto the HR group as part of his permanent record.

Q. But was there an investigation on the allegations, is what I'm saying?

A. I don't know. I don't know if there was an investigation of that or not.

Q. I mean a separate one with regard to that, though, I'm saying. Not with regard to the harassment issue. I'm just asking with regard to his concern, his complaints.

A. I don't recall if there was something done or * * *

* * *

EXCERPTS FROM TRANSCRIPT OF ESC HEARING

JAMES M. GIBBS, JR.

(September 19, 1997)

A. Well that was it right then, but then when I gathered my stuff together to finish my time card and go, everything and was going out the door, I met him, he was going back toward his office, and he said I'll see you at six.

Q. Now, did you speak with Mr. Bone before you left that day?

A. Sure did.

Q. And what did you want to speak to him about?

A. About why that reprimand was reinstated.

Q. And what did he say? Did you ask him?

A. I asked him. I asked him if Mon had mentioned to him anything about the, me coming in, about the advanced notice that I had given, he said that long term advance notice wasn't permissible. He said that, you couldn't do that and I told him that, I said well my, my policy books says otherwise, you know, I said show me in yours what, where that is, he said, you're a big boy, you can read, you know, he said you're a big boy, you should be able to read.

Q. So you asked him where, in the part, where in the personnel policy it said you had done anything improper?

* * *

EMPLOYER WITNESS TESTIFIES AS FOLLOWS: (Blizzard)

A: No, after, after work, this is off the work (PORTION OF TAPE INAUDIBLE ONE SECOND).

CLAIMANT TESTIFIES AS FOLLOWS:

A. After what?

EMPLOYER WITNESS TESTIFIES AS FOLLOWS: (Blizzard)

A: After work.

CLAIMANT TESTIFIES AS FOLLOWS:

A: After work?

EMPLOYER WITNESS TESTIFIES AS FOLLOWS: (Blizzard)

A: Mon testified that you were driving around in the parking lot, is that true?

CLAIMANT TESTIFIES AS FOLLOWS:

A: Oh, when I, after I talked to, to Bone in the hall, that on the 12th at the end of the day, his last words were something about another Indian remark about you dance dance to our drums, he said you dance to our drums. Hadn't I learned yet that you dance to our drums, and he said good-bye chief, like that, called me chief, you know, and I told him that I was, talk to you, I said I would also talk to EEOC. And he didn't he * * *

* * *

A: Correct.

Q: And again, on March 13, 1997, when he was let go for the alleged violaton of this agreement he signed, to whom were those comments supposedly spoken?

A: Mr. Vonkchalee.

Q: Mr. Vonkchalee. And when were those comments spoken? Do you know?

A: The comments were spoken

Q: If you don't I'll as Mon Vonkchalee.

A: Okay.

Q: Now, how many other employees at Morganite had their personal belongings searched on a regular basis?

A. On a regular basis, none.

Q. None? How many other employees had their belongings searched at all, besides Mr. Gibbs?

A: Well, (PORTION OF TAPE INAUDIBLE ONE SECOND) I can't answer that one.

Q: How many employees had their car searched?

A: In my time, I don't know of any.

Q: Other than Mr. Gibbs?

A: Right.

* * *

disagreement, as I understand from the documentation, regarding Saturday work. And Burt, Mr. Jenkins felt threatened and that kind of prompted this write up here. So it would be the first thing I would submit. Really, everything was fine for a number of years, that was, was then. In 1995, everything had been fine for several year and I'd notified Russell Lee who was Morgan's supervisor then, gave him a year in performance review, for you

Q: Okay.

A: You've already got it?

Q: Yeah, I've got one of those

A: I'll just give you this whole stack then.

Q: Okay.

A: That might be easier. I'll just give you this whole stack for now. I'm getting things mixed up.

Q: Yeah.

A: This review was a, was a overall a good review. There was one mark on the review that, that Morgan questioned which was the cooperativeness, as in number three rating. Okay, and he questioned that, and in the questioning process, according to Roger Bone, who was

the plant manager, made some threatening comments toward Roger, and based on that, David Cooper gave him this, this file counseling back in January 1996. Which basically says that, you know, for lack of a better term, put on probation because of this threatening behavior and any other social marks may result in termination, that was given in 1996. There's a copy over there. Then, and, I'm sorry, Morgan attached with that an explanation and that's also included.

Q: Okay, this, okay.

A: Then March 12, Morgan was given a second level counseling for not reporting an absence within one hour of his scheduled shift. Our policy is, which I've also got in there, a copy of our attendance policy, I've think I've highlighted the pertinent section, which, which reads, absences are to be reported by employees to the supervisor no later than one hour prior to the start of the shift, otherwise, this is designated as not notifying the supervisor. That's also in our handbook, (PORTION OF TAPE INAUDIBLE ONE SECOND) that same * * *

* * *

EXCERPTS FROM DEPOSITION OF MON VONKCHALEE

(May 4, 2000)

[54] Q. Let's go back to March 3, 1997. You and Mr. Gibbs stand out on the curb?

A. Yes, sir.

Q. Him reminding you that you had given him that previous day off, that morning off?

A. Yes, sir.

Q. You indicated earlier that you didn't know – you didn't remember whether you did or didn't?

A. Right.

Q. Was it safe to assume that Mr. Gibbs might have thought that the issue was resolved at that point?

Ms. Berdahl: Objection.

A. Yes, his assumption. Yes, sir.

Q. Why would he make that assumption?

A. Because he probably think that it was [55] okay to tell somebody two months ahead of time that he is going to be off for a couple of hours, three months later or something like. I don't know, because I don't remember that he told me that.

Q. Prior to that date you and Mr. Gibbs had no problems?

A. No, sir.

Q. Would it be fair for me to characterize that you might have even liked him?

A. Yes, sir.

Q. Did you trust him?

A. Yes.

Q. Were you able to ascertain whether he might trust you?

A. Yes. It was a pretty mutual relationship.

Q. On Tuesday March 4th when you presented him with that second level counseling, it was your testimony that he said, I amd not going to take that shit and got up and walked out?

A. Right.

Q. Were you able to ascertain at any point during that exchange or later, why he was upset?

A. Can you phrase that again, sir?

Q. Why was Mr. Gibbs mad when you gave him* * *

* * *

[58] Q. Do you recall him pointing out to you when he returned with the Morganite policy book, that he should not have gotten a second level counseling and that tardiness should not be considered an incident because he had prior approval?

A. I don't remember that.

Q. You are not saying it didn't happen, you just don't remember it?

A. Yes, sir.

Q. On the 11th – I'm sorry. We don't know what date, but at some point you then spoke with Doug Blizzard, and you informed him of threats Mr. Gibbs had made to you?

A. Yes, sir.

Q. Now when you informed him of those threats, do you know if he documented them in any way?

A. Who, Mr. Gibbs documented –

Q. No. Mr. Blizzard, Doug Blizzard.

A. I don't know. He jot something down.

Q. He jot what down?

* * *

[Defendant's Exhibit 4]

MORGANITE INCORPORATED

EXHIBIT IV – RECORD OF CORRECTIVE ACTION

___ 1st Level Counseling
✓ 2nd Level Counseling
___ Final Counseling
___ Discharge

EMPLOYEE NAME: Morgan Gibbs
CLOCK #C332
SUPERVISOR NAME: Dimol Vonkchalee
DEPARTMENT: 650
DATE FORM PREPARED: 3-11-97
DATE OF OFFENSE: 3-4-97

1. Circumstance necessitating this action: NO REPORT FAILED TO REPORT WITHIN ONE HOUR OF HIS SCHEDULED WORK SHIFT.

2. CORRECTIVE ACTION EXPECTED BY SUPERVISOR (Specify applicable follow-up dates - any possible subsequent action).

"NO REPORT" two times within one year from 3-4-97 will result in final counseling.
"No Report" three times from 3-4-97 will subject to discharge per company policy.

3. EMPLOYEE EXPLANATION/RESPONSE _____

3-4-97 Presented to employee, and he refused to sign.

Employee Date

[Illegible] 3-11-97

Supervisor Date

Philip Booth
Witness
3-11-97

Roger K. Bone 3/11/97

Manager Date

(Written Reprimand/Discharge)

Vice President Date

J.D. Blizzard/s/ 3/19/97

Human Resources Date

EXCERPTS FROM DEPOSITION OF DAVID COOPER

(May 4, 2000)

[41] Q. Was there a chance that you may have, before Mr. Gibbs spoke to you, had an opportunity to speak to Mr. Bone about Mr. Gibbs' meeting?

A. Roger would have informed me about his meeting with Mr. Gibbs, yes.

Q. Would his meeting with you or at least his conversation with you have come before you met with Mr. Gibbs?

A. Yes.

Q. What did Mr. Bone tell you about his meeting with Mr. Gibbs?

A. I don't remember.

Q. Did he tell you that Mr. Gibbs had threatened him?

A. I don't recall. I don't recall that being the case, no.

Q. Do you remember the approximate date of this meeting that you had it with Mr. Gibbs?

A. December 1996. I'm guessing. You know, I'd have to look at the documents to be sure, but I think that's when it was.

(Plaintiff's Deposition Exhibit #7
was marked for identification.)

Q. I want to make sure I understand this. I'll show you what's marked as Plaintiff's Exhibit #7 and see if***

* * *

[Defendant's Exhibit 5]

Sunday, March 16, 1997

Morganite Inc.

This is a report on the incident on March 11, 12, 13, 1997 between Mon Vonkchalee and James Morgan Gibbs.

March 11, 1997. I spoke with Doug Blizzard about the situation that I had with Morgan Gibbs. Doug suggest that I should be fair to everyone and be consistant. According to the Morganite's policy Morgan Gibbs Should be written up for 2nd Level Counseling.

March 12, 1997. (Aproximately 2:30 pm) I presented the 2nd Level Counseling to Morgan Gibbs again for the second time with Larry West as a witness. I explained to Morgan that I had to be fair to everyone and I had to be consistant. According to the Morganite's policy Morgan Gibbs Should be written up for 2nd Level Counseling. I told him that he doesn't have to sign it (2nd Level Counseling) but I just had to let him know that I'll file it.

Morgan said, "That's cool". And he went back to work. Lary and I also went back to work.

At about 3:05 Morgan confront me in the tool room. He said "Mon I thought that you told me everythings was o.k.'d, what is going on? I told you that I'm not taking this shit from anybody. Who is involved with this, Doug?" I said, if you have a problem with this let's go talk to Doug together. He point to his back pack and said "see what is in this bag? I'm going to take care of Doug and Roger Bone myself, I don't worry about you. I'll waiting in the car." Then he walked out the back door.

I called Doug and Roger right away to let them know what happened and to let them know that Morgan is comming to take care of them.

Morgan drove to human resources and waiting outside, but din't get out of his car. He drove off after awhile.

I went to Doug afterward, to explain what happened. Doug and Roger had decided to discharge Morgan Gibbs based on the last Final Counseling (treatening), and the treatening that Morgan made to me today.

At about 4:15 Roger Bone tried to contact Morgan to let him know that he was discharged, but he wasn't home.

March 13, 1997 Morgan was discharged.

/s/ Signed

[Illegible]

3-16-97

He has threatened everybody that I mentioned, Bruce Muller, David Cooper, Burt Jenkins. He said:

> He told them that there is some distance from Morganite's door to their own house, if he wanted to, he could get anybody in between.
> He told me that he has talked to everybody in that manner and that he would not take any shit from anybody.
> Morgan asked me to consider this case as a medical problem or medical emergency using this example as an analogy,
> If he was driving to work and got in an accident and he could not call in, why can't I treat this situation the same as I would have treated the first incident.

I told him I would think about it.

Doug Blizzard, Human Resources wasn't available. I was told by Sheila Ennis that his final counseling was for threatening remarks he made to another employee. It was recommended that I give him a second level counseling for *no-report.*

Today Tuesday March 4

Today, Tuesday March 4, I had Phillip and Morgan Gibbs in my office, I started the conversation by saying, "Morgan, you already know why your here, you did not call in within 1-hour and you came in late on Monday, March 3. I thought about this incident, I cannot bend the rules I'm going to write you up for a second level counseling. Just as I finished my sentence he said

"I don' take this shit from anybody"

He walked out. (he stood up from the seat, his hands were shaking when he walked out)

Phillip and I looked at each other, Phillip asked if he is needed anymore, I told him, no thanks. Phillips went back to the Tool Room.

I was getting ready to walk out and find out where Morgan went.
Morgan walked back into my office.
Now he and I were alone in my office.
He said to me in this tone of voice

"Mon I don't have anything against you but I will not sign this (the written warning). If *they* want to fire me, go ahead and fire me. *They* already know what's coming to them, I came to work prepared today, because I knew this was going to happen!"

At that point I felt like Iwas being threatened even though he did not use my name but I felt very intimidated so I reconsidered. I didn't want to throw gas on

the fire so I crumbled up the second level counseling form and threw it in the trash can and said:

"Morgan let me work this thing out with you, I realize you have a lot of problems with Morganite and I want to start fresh with you. I want to start out by warning you, this is not a situation I want to have to handle again, I want to be fair to everybody, I don't want to bend the rules and I just have to be frank with you, if this happens again I'm going to be firm and write it down but since I don't understand what a Migraine headache is, I'll consider this as a Medical Emergency. He said that he would be very glad to accept that and he will try not to do this again. Since I already spent this much time with him I wanted to find out a little bit more of what he had in mind. If there is anything I need to be aware of to help myself or to help him, because I am there as a supervisor.

"What else do I need to be aware of? But don't tell me anything that you don't want me to know."

He started out by repeating what he told me yesterday, that Morganite as a whole is O.K. to work for, but the management is not, they are all out to get him. Again he mentioned Bruce, David, Roger, Burt, and Russell Lee. I asked him if he would give me some exampl. He said yes.

He had a review from Russell Lee, he did not like it because it was unfair so he told them that he would not take this from anybody because this is discrimination, and he was being picked-on. Everybody else has had a raise and has been moved up, he has not. He has been at the same level for many years.

He said, he was always juded on who he is ("I'm an Indian"), not on how he works. He said if no-one fucks with him he will not fuck with them, he will

leave them alone. Just let me work on my own I know what I'm doing. That is how he was raised.

If Morganite leaves him alone and lets him do his job the way he wants it he would not have a problem with anybody, he will try to work with anybody he can.

By this time I said O.K. what else?

He told me that he has a problem with trusting people.

He has a problem with someone watching over his shoulder.

He has a problem sleeping somewhere other than his own home.

He has a problem learning quickly.

He has a problem working overtime.

He also told me that he does not want to work anymore than 40 hours, I asked him: "do you want to work just 40 hours and go home and forget about everything"

He said, yes and that's what work is all about to him, he has other life beside work.

I told him that in order to be able to advance at Morganite, there are many things that we consider, there are 8 things, for example.

Productivity
Knowledgeability
Attendance
Cooperation
Ability to Learn
Safety

I brought out the review sheet and went over it with him and asked him to read all of it with me and he said:

I've been through all of that before, it's a bunch of bullshit because he knows what he's doing, he does his job well, he may be a little bit slow doing his works but his works are always right.

If Morganite cannot accept this, that is their problem, not mine, I have gotten to be the way I am now because of Morganite.

He said

"They are getting what's coming to them"

He kept repeating this phrase.

I'm the type of person, have you ever heard of *The Postal Service* that someone went in and guned down everybody, I can come in here and take everybody down if I wanted to.

I said to him "as far as moving up, I would have to give you some more responsibility"

He said he would not care for that, he would not care for any more responsibility,

He just wants to do what he's doing right now.

I told him I did not think that that was good enough.

He said well that's MORGANITE's problem, they made the rule up as they go, like the wire EDM was added recently to prevent me from become Tool Maker B.

I said, "Well if you hate MORGANITE this bad why don't you find another job or go look for something else, why have you let Morganite do this to you.

He said he cannot leave, he needs to work, and also it doesn't matter where he goes they will all treat him like this anywhere.

By this time I was so confused, I didn't know what he wanted and I just said OK, I'm going to see if I can work with you, but please understand that I'm going to treat you like everybody else. And If you think I discriminate against anybody I am myself a minority, and if you think I judge some people because of their color of skin, look at my skin. I explained to him that I plan on being fair, straightforward and honest. If he has a problem with

someone that he can talk to me, not to do anything that will get himself in trouble. If he does not feel comfortable talking to someone, he can always talk to me. He said he will.
So we got up and shook hand.

By this time he got himself and myself so would up that I couldn't function the rest of the day and obviously he couldn't function the rest of the day because I assigned some work to him and Phillip assigned him some work, he was seen going around talking to people creating some type of conversation all day. I didn't have time to fool with that. I had things I had to take care of. I took care of some things and went to see Roger Bones right away, I didn't want to put off passing along the incident.

Roger assured me that I did the right thing by not blowing things out of proportion, and by trying to understand his situation.
I feel comfortable with what I did but I do not feel comfortable with what he is going to do.

Roger Bone suggested that I Should talk with Doug Blizzard.

I went back and told Morgan that everything is ok'd.

/s/ Signed

[Illegible]

3-16-97

APPENDIX D

UNITED STATES DISTRICT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

2:95 CV00826

CHRISTOPHER J. ODINKEMELU,

Plaintiff,

v.

CONSOLIDATED STORES CORPORATION,

Defendant.

1998 U.S. Dist. LEXIS 8150

April 3, 1998, Decided
April 3, 1998, Filed

COUNSEL: CHRIS J.S. ODINKEMELU, plaintiff, Pro se, HIGH POINT, NC.

For CONSOLIDATED STORES CORPORATION dba BIG LOTS STORES, defendant: PETER G. PAPPAS, LARRY I, MOORE, III, DENA BETH LANGLEY, ADAMS KLEEMEIER HAGAN HANNAN & FOUTS, GREENSBORO, NC.

JUDGES: N. Carlton Tilley, Jr., United States District Judge.

OPINION BY: N. Carlton Tilley, Jr.

OPINION: MEMORANDUM OPINION

TILLEY, District Judge

This case is currently before the Cout on Defendant Consolidated Stores International's (CSC) Motion for Summary Judgment [Doc. #67]. For the reasons stated below, this Motion is GRANTED IN PART and DENIED IN PART.

I.

The facts, viewed in the light most favorable to Plaintiff Christopher J. Odinkemelu, are as follows:[1] CSC operates a chain of retail stores under the name "Big Lots." Mr. Odinkemelu, a Nigerian, was employed by Big Lots as an assistant manager from January of 1993 until he was discharged on September 14, 1995.

Mr. Odinkemelu began training at Big Lots store #343, in High Point, North Carolina, on January 15, 1993. In late March of the same year, Ms. Linda Moore, who at the time was a Management Recruiter for CSC, called Mr. Odinkemelu and told him that he had been assigned to work in Big Lots store #521 in Tampa, Florida, once his training was complete. She also instructed

[1] Mr. Odinkemelu has submitted three documents apparently intended to serve as affidavit. The first is captioned, "Affidavit: Plaintiff's Objections to Defendants [sic] 'Motion to Dismiss and for Sanctions, in Conjunction with Defense Witnesses' False Statements' Rendered" (Pl.'s Aff. # 1.) This document does not conform with Federal Rule of Civil Procedure 56 in that it contains a number of statements that are not based on personal knowledge or are hearsay. See Fed. R. Civ. P. 56(e). Another document is captioned, "Affidavit of Christopher Odinkemelu and Further Response to Defense Motion for Summary Judgment," (Pl.'s Aff. #2.) This document is also rife with statements not based on personal knowledge. The Court has considered only those statements in these documents that are clearly based on Mr. Odinkemelu's personal knowledge. The third document, captioned simply "Affidavit," (Pl.'s Aff. #3) is in the correct form and has been considered accordingly.

him to call the district manager responsible for store #521 with this news . . . When Mr. Odinkemelu called store #521, he spoke with Ms. Williams rather than with the district manager. Ms. Williams told Mr. Odinkemelu that she had filled the position with another person and that she needed only "citizens of American origin" who lived in Florida to work as managers in that store. When Mr. Odinkemelu attempted to explain that, although he is Nigerian, he is eligible to work anywhere in the United States, Ms. Williams threatened to fire him. Mr. Odinkemelu reported this conversation to Ms. Moore and to her supervisor at the time, Ms. Penny Davis.

In early 1993, Mr. Page also received complaints that Mr. Odinkemelu did not communicate professionally with hourly employees, was abrasive to other managers, was demeaning and dictatorial to female employees, was impatient and emotional, and did not accept constructive criticism from his supervisors well. Mr. Page counseled Mr. Odinkemelu on all of these problems.

In March of 1993, Mr. Page began a series of oral training sessions concerning various management issues with Mr. Odinkemelu. Mr. Page certified that Mr. Odinkemelu had completed these sessions in August, but he did so with reservations because of his perception that Mr. Odinkemelu had difficulty applying the training pripciples to on-the-job situations.

In June of 1993, Ms. Williams required Mr. Odinkemelu to retake a 50-question multiple choice test. She did not require a white assistant manger who had begun training with Mr. Odinkemelu to retake this test.

By July of 1993, CSC felt that Mr. Odinkemelu's management style had caused morale problems in the High Point store. Because of these problems, he was

transferred to Store #266, in Greensboro, North Carolina, for the remainder of his training.

In August of 1993, Mr. Odinkemelu had a confrontation with a black male hourly employee named Fabian. Fabian bumped into Mr. Odinkemelu with a pallet jack, initially laughed, and then apologized. Fabian then bumped into Mr. Odinkemelu again. At some point during this incident, Mr. Odinkemelu threatened to send Fabian to jail. Mr. Odinkemelu did not require medical attention. After the incident, Mr. Odinkemelu received a written First Progressive Counseling Notice for unprofessional behavior and for allegedly threatening to send Fabian to the hospital.

In November of 1993, Mr. Odinkemelu had a confrontation with a female cashier named Christy while instructing her on the proper method of storing shopping cards. Mr. Odinkemelu received a Final Progressive Counseling Notice on November 12, 1993 as a result of this incident. This notice said that Mr. Odinkemelu had demanded that Christy do as he said and that he had touched her arm. It also contained a warning that failure to improve his communication skills or the occurrence of another would similar incident would result in further counseling, including possible termination. According to another employee who witnessed this confrontation, Ms. Mary Parker, Mr. Odinkemelu properly reprimanded Christy for her carelessness and did not touch her.

On December 31, 1993, two female employees made written statements accusing Mr. Odinkemelu of sexually harassing them. Myrtle Foust accused him of asking her personal, sexual questions on two prior occasions. She also accused him of asking her for oral sex on December 24. Veronica McLean accused him of asking her

personal, sexual questions on December 17 and of offering her money in exchange for sex on December 23. Mr. Odinkemelu, however, took his annual vacation from December 22 through January 5, and denies sexually harassing either of these employees. Another assistant manager also denies that Mr. Odinkemelu asked Ms. Foust for oral sex on December 24. In February of 1994, Ms. Davis told Mr. Odinkemelu that these complaints had been filed but did not tell him who had filed them. She also orally counseled Mr. Odinkemelu concerning sexual harassment generally, and warned him that he would be subject to possible discharge if CSC received any other complaints of sexual harassment by him.

In March of 1994, Mr. Page conducted Mr. Odinkemelu's annual performance review. Mr. Odinkemelu's overall rating was "requires improvement."

In July of 1994, Mr. Odinkemelu received a written Progressive Counseling Notice for failing to report to work as scheduled on July 17.

In September of 1994, CSC received several more complaints about Mr. Odinkemelu. A customer who had attempted to return some merchandise, Ms. Alicia Oakley, complained that Mr. Odinkemelu had been aggressive and intimidating to her, refused to give her a complete refund, refused to let her speak to the store manager, and, the next evening, called her at home and reminded her that he had her address and phone number. Ms. Oakley perceived this call as threatening. Mr. Odinkemelu and another employee who witnessed the exchange with Ms. Oakley, Ms. Carol Anderson, deny that Mr. Odinkemelu was rude and assert that Ms. Oakley received a particl refund because she only returned one piece of a two-piece outfit. Another customer, Ms. Karen Jones,

complained that Mr. Odinkemelu had approached her in the store and made unwelcome sexual remarks to her. He denies making the alleged remarks. Finally, Ms. Foust complained that Mr. Odinkemelu made another pass at her by touching her breast and then asking to do so again. When confronted about this final complaint, Mr. Odinkemelu explained that he had accidently brushed against Ms. Foust in an attempt to wave away cigarette smoke that she had blown into his face.

After CSC received this last series of complaints, Ms. Williams reviewed the incidents with Mr. Page and the store manager. She then reviewed Mr. Odinkemelu's entire history at CSC with CSC's Vice President of Associate Relations and Development. The two of them decided to discharge Mr. Odinkemelu, effective September 14, 1994. Mr. Odinkemelu received a Final Progressive Counseling Notice with a letter explaining the reasons for his termination. The letter said that he was discharged for violation of CSC's harassment and standards of conduct policies, including the two incidents in which Mr. Okinkemelu had received counseling for mishandling situations with associates, the complaints of sexual harassment from female associates, and the two complaints from customers.

On November 22, 1994, Mr. Okinkemelu filed a charge of national origin discrimination and retaliatory discharge with the Equal Employment Opportunity Commission (EEOC). In his charge, he claimed that his discharge was discriminatory because it was motivated not by the reasons stated in the letter but by his national origin and in retaliation for his protest against what he claims were unlawful employment practices by CSC. After receiving his right-to-sue letter from the EEOC, Mr. Odinkemelu filed this action. He is proceeding in this lawsuit pro se.

II

A charge of discrimination under Title VII must be filed with the EEOC within 180 days of the alleged unlawful employment practice. See 42 U.S.C. §20003-5(e)(1). Any charge not made within 180 must be dismissed by a court as untimely. See Delaware State College v. Ricks, 449 U.S. 250, 256, 101 S.Ct. 498, 503, 66 L.Ed.2d 431 (1980). Only after a plaintiff has timely filed a charge of discrimination with the EEOC, the EEOC has issued a right-to-sue letter to the plaintiff, and the plaintiff has filed a complaint with a district court within 90 days after receiving the letter does that court have jurisdiction over the plaintiff's claim. See id. §2000e-5(f)(1); Davis v. Norther Carolina Dept. of Corrections, 48 F.3d 134, 138 (4th Cir. 1995). The court's jurisdiction is limited by the allegations contained in the initial charge of discrimination filed with the EEOC. Only the discrimination claims stated in the initial charge, "those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint" may be maintained in a Title VII suit. Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 963 (4th Cir. 1996).

In this case, Mr. Odinkemelu's initial EEOC charge listed only discrimination based on national origin and in retaliation for opposing unlawful employment practices. (See Def.'s Mem. Supp. Mot. Summ. J. Ex. A.) Also, Mr. Odinkemelu listed September 14, 1994 as both the earliest and the latest date on which discrimination took place. (See id.) Mr. Odinkemelu's Complaint, however, contains a much more extensive list of claims against CSC. Read broadly, his Complaint alleges retaliatory discharge, post-discharrge retaliation, discriminatory discharge, and discriminatory treat-

ment while employed. In various other documents filed with the court, Mr. Odinkemelu has also made charges of gender discrimination, breach of contract, and violations of his Sixth Amendment rights.

This Court has jurisdiction only over Mr. Okinkemelu's claims that (1) he was discharged in retaliation for opposing unlawful employment practices by CSC, and (2) he was discharged because of his national origin. His EEOC charge was timely filed with respect to these claims and it can be read to encompass both. Mr. Odinkemelu's claim that he received discriminatory treatment while employed by CSC based on his national origin was not timely filed. The last instance of discriminatory treatment he alleges in his Complaint occurred on November 12, 1993, (see Pl.'s Aff. #1 at 10), over a year before he filed his EEOC charge. However, relevant evidence concerning these instances of discriminatory treatment is admissible to support his timely filed claims. See Evans, 80 F.3d at 963.

The Court has no jurisdiction over Mr. Odinkemelu's post-discharge retailation claim or his gender discrimination claim. Neither is reasonably related to his original complaint, nor would either be discovered by a reasonable investigation of his original complaint. See Evans, 80 F.3d at 963-64 (dismissing claims of sexual harassment, age discrimination, and discrimination in pay and benefits when plaintiff's EEOC charge claimed that she was not promoted because of her sex); Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995) (dismissing claims of discrimination in hiring, training, and promotion when plaintiff's EEOC charge claimed that he was subjected to discriminatory discipline); Mulhall v. Advance Sec., Inc., 19 F.3d 586, 589 n.8 (11th Cir. 1994) (dismissing claim of discrimination in promotion when

plaintiff's EEOC charge claimed discrimination in pay). The Court will not consider Mr. Odinkemelu's claims for breach of contract or violations of this Sixth Amendment rights because his Complaint cannot be read to support these claims. See Fed. R. Civ. P. 8(a).

III.

Summary judgment is proper only if there is no genuine issue as to any material fact. The party moving for summary judgment has the burden of: (1) pointing to deficiencies in the record as to matters upon which the opposing party has the burden of proof such that the opposing party cannot prove its claim or defense, or; (2) showing otherwise why, upon the undisputed facts in the record, the moving party is entitled to judgment as a matter of law. The party opposing the motion for summary judgment may not merely rest on its pleadings, but must provide evidence or point to evidence already in the record, properly authenticated pursuant to Rule 56(e), that would be sufficient to support a jury verdict in its favor. See Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); Orsi v. Kirkwood, 999 F.2d 86 (4th Cir. 1993). The test to be applied in determining sufficiency of the evidence on the questioned point, therefore, mirrors that applied at the directed verdict (now "judgment as a matter of law") stage of a trial. See Herold v. Hajoca Corp., 864 F.2d 317 (4th Cir. 1988), cert. denied, 490 U.S. 1107, 104 L.Ed.2d 1022, 109 S.Ct. 3159 (1989).

A.

Discharge of an employee "because he has opposed any practice made an unlawful employment practice by

[Title VII]" violates Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a). To prove his claim under this section, Mr. Odinkemelu can either offer direct or circumstantial evidence that CSC unlawfully retaliated against him, or he can proceed under the inferential proof scheme set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). See Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1227-28 (4th Cir. 1998). To establish a prima facie case of retailation under the McDonnell Douglas scheme, Mr. Odinkemelu must demonstrate that (1) he engaged in protected activity, (2) the employer took adverse action, and (3) there was a causal connection between the two. See Karpel, 134 F.3d at 1228. The burden of establishing a prima facie case is "nto onerous," Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981), but Mr. Odinkemelu's evidence must be sufficient, if credible and unopposed by CSC, to entitle him to judgment as a matter of law, see id. at 254, 101 S.Ct. at 1094; Ennis v. National Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 59 (4th Cir. 1995). If he establishes a prima facie case, the burden shifts to CSC to produce a legitimate, nondiscriminatory reason for discharging him. See 134 F.3d at 1228. If CSC does so, Mr. Odinkemelu then bears the burden of showing that CSS's proffered reason for his discharge is pretextual. See id.

Mr.Odinkemelu can estbalish a prima facie case of retaliation. First, his informal complaints to supervisors concerning Mr. Williams' refusal to assign him to the Tampa store constituted a sufficient protest to trigger Title VII's protections. See Armstrong v. Index Journal Co., 647 F.2d 441, 448 (4th Cir. 1981). Second, there

is no dispute that Mr. Odinkemelu was discharged. Third, the fact that he was discharged after making his complaint creates, at minimum, an inference that the discharge was caused by his complaint. See Karpel, 134 F.3d at 1229 (finding that plaintiff established prima facie case with little or no direct evidence of a causal connection); see also McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991) (holding that causal connection can be inferred from mere fact of discharge after protected activity). CSC argues that Mr. Odinkemelu cannot prove this element and cites several cases in which courts have found that shorter time periods prevented a finding of a causal connection. See Willis v. Marion county Auditor's Office, 118 F.3d 542, 546 (7th Cir. 1997) (one year); King v. Town of Hanover, 116 F.3d 964, 968 (1st Cir. 1997) (five months); Godby v. Electrolux Corp., 1994 U.S. Dist. LEXIS 19831, 1994 WL 777327, *15 (N.D. Ga. 1994), aff'd, 58 F.3d 641 (11th Cir. 1995), cert. denied, 517 U.S. 1120, 116 S.Ct. 1352, 134 L.Ed.2d 520 (1996) (seven to eight months). None of the plaintiffs in these cases, however, had any evidence suggesting a connection between their initial complaints and their discharges. In this case, Mr. Odinkemelu argues that Ms. Williams, acting on behalf of CSC, used the time between his complaint and his discharge to place in his file several disciplinary forms based on accusations that CSC knew or should have known were false. (See, e.g., Pl.'s Objections Summ. J. at 3.) He points to evidence that a reasonable juror could find supports his contention, such as testimony by Ms. Parker, another employee who witnessed his confrontation with Christy, that contradicts the version of this incident contained in the Final Progressive Counseling Notice

he received after the incident. (See Pl.'s Aff. #3 Ex. 4.)[2] His statement in his affidavit that he was on vacation during days on which he was accused of sexually harassing other employees, (see Pl.'s Aff. #2 PP 2-3), could also support his contention. Such evidence, at least at this stage, overcomes any inference of a lack of causation created by the temporal gap between his initial protest and his discharge.

Mr. Odinkemelu can also meet his secondary burden of proof under the McDonnell Douglas scheme. CSC has offered a legitimate, nondiscriminatory reason for his discharge – his poor performance, as reflected

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[2]Ms. Parker testified at a hearing conducted by the North Carolina Employment Security Commission (ESC) on November 15, 1994. CSC argues that this and all other ESC testimony Mr. Odinkemelu has introduced, (see Pl.'s Aff. #3 Exs. 4-8), is absolutely privileged pursuant to N.C.G.S. Section 96-4(t)(5). See also Hartsell v. Duplex Prods., Inc., 895 F. Supp. 100, 103 (W.D.N.C. 1995) (refusing to allow plaintiff to support her Title VII claim with ESC testimony because of N.C.G.S. §96-4(t)(5)). This argument is unconvincing. In actions governed by federal law, privileges are governed by federal common law. See Fed. R. Evid. 501. Federal common law contains no privilege concerning testimony from state employment benefits hearings. See EEOC v. Illinois Dep't of Employment Sec., 995 F.2d 106, 107 (7th Cir. 1993). Where state and federal privilege law conflicts, a court should weigh the historical and policy considerations underlying the state privilege and concerns of comity against the federal interests at stake. See United States v. Cartledge, 928 F.2d 93, 96 (4th Cir. 1991). The ESC privilege is presumably intended to encourage full disclosure from claimants at ESC hearings by preventing their statements from being used against them. Here, however, it is the claimant who seeks to introduce evidence from the hearing for the express purpose of bolstering his case. The policy underlying the state privilege in inapplicable, so the federal interest in enforcing the protections of Title VII controls. The ESC testimony attached to Mr. Odinkemelu's Affidavit #3 is not privileged for the purposes of this action and has therefore been considered by the Court.

in numerous complaints from customers and employees and negative evaluations by his supervisors. (See, e.g., Davis Aff. PP. 5-9; Page Aff. PP 4, 6-7, 13-15, 17-20; Williams Aff. PP 7-8, 11, 15-25, Exs. 6-7, 9-17.) Mr. Odinkemelu, in turn, points to evidence from which a reasonable juror could conclude that this reason was pretextual. The same evidence discussed above could support such a conclusion. Mr. Odinkemelu maintains that he was on vacation while at least two of the alleged episodes of sexual harassment occurred. (See Pl.'s Aff. #2, PP 2-3.) Despite the ease with which this assertion seemingly could be refused, CSC has not offered evidence to do so. Mr. Odinkemelu also points to testimony in which Ms. Foust admitted that another assistant manager who allegedly witnessed Mr. Odinkemelu's request for oral sex denied that Mr. Odinkemelu had made such a request. (See Pl.'s Aff. #3 Ex. 5.) A juror could reasonably infer from this evidence that CSC knew that Mr. Odinkemelu could not have harassed his accusers but used their false accusations to justify, at least in part, his discharge. Also, Mr. Odinkemelu points to Ms. Parker's testimony before the North Carolina Employment Security Commission that he did not touch Christy's arm as evidence that CSC was concocting reasons to discipline him. (See Pl.'s Aff. #3 Ex. 4.) This evidence could also be interpreted to suggest that CSC was disciplining Mr. Odinkemelu for events that it knew did not occur. The possibility of this interpretation is sufficient to create a genuine issue of material fact as to whether CSC's proffered reason for discharging him was pretextual, thus preventing the grant of summary judgment on this claim.

B.

Mr. Odinkemelu also claims that CSC violated Section 703(a) of Title VII, which makes it unlawful for an employer to ". . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin." 42 U.S.C. §2000e-2(a)(1). The McDonnell Douglas proof scheme is also applicable to this claim. See Karpel, 134 F.3d at 1228. To establish a prima facie case of discharge motivated by national origin, Mr. Odinkemelu must demonstrate (1) that he is a member of a protected class, (2) that he was qualified for his job and that his job performance was satisfactory, (3) that, in spite of his qualifications and performance, he was discharged, and (4) that the position remained open to similarly qualified applicants after his dismissal. See id.

Mr. Odinkemelu can establish a prima facie case for this claim as well. There is no dispute that Mr. Odinkemelu is Nigerian, or that he was discharged.

His evidence concerning the second element, his qualifications for and performance of his job, is meager at best, but it would be sufficient to sustain a judgment as a matter of law in the absence of evidence from CSC. See Burdine, 450 U.S. at 254, 101 S.Ct. at 1094. Mr. Odinkemelu points to evidence suggesting that he scored a 96% on a test administered by Ms. Williams, (see Pl.'s Aff. # 1 at 4), that he received bonuses in return for his contributions to cash flow and increasing store profits, (see Pl.'s Aff. #1 at 26), that he always followed CSC's standards of conduct when dealing with employees and customers, (see Pl.'s Aff. #2 P 7), and that the allegations that he had a difficult time making deci-

sions, accepting criticism, and relating to employees are false, (see Pl.'s Aff. #1 at 26.) His self-assessment of his performance as "very good" or "excellent" in all areas, reflected in his yearly performance appraisal submitted by CSC, could also be interpreted as some evidence that he was performing satisfactorily (See Williams Aff. Ex. 11). Although CSC points to a voluminous record of problems with Mr. Odinkemelu's performance, (see, e.g., Davis Aff. PP 5-9; Page Aff. PP 4, 6-7, 13-15, 17-20; Williams Aff. PP 7-8, 11, 15-25, Exs. 6-7, 9-17), a reasonable juror could find Mr. Odinkemelu's evidence credible and conclude that his qualifications and performance were satisfactory.

Mr. Odinkemelu has also pointed to evidence that could support a finding in his favor on the fourth element of his prima facie case, that his position remained open to similarly qualified applicants after his discharge. He maintains that, after his discharge, his assistant manager position was immediately filled by Ms. Foust, a former subordinate of his who is not Nigerian. (See Pl.'s Aff. #1 at 7.) CSC has evidence that his position was not filled after his discharge. (See Williams Aff. P. 25.) A reasonable juror could accept Mr. Odinkemelu's evidence and find that he satisfies this element of his prima facie case.

The evidence, relevant to and the analysis of whether CSC's proffered reason for discharging Mr. Odinkemelu was pretextual, supra at III.A., is equally applicable to this claim. In addition, Mr. Odinkemelu maintains that a white assistant manager who began training at the same time he did was not retested by Ms. Williams, (see Pl's Aff. #2 P 13), that a white assistant manager was not disciplined after he had an incident with another employee similar to the one that he had with Fabian, (see Pl's Aff.

#1 at 9), and that a white assistant manager was not disciplined after Christy complained that he had been extremely rude towards her, (see Pl.'s Aff. #1 at 12.) While CSC has evidence that Mr. Odinkemelu was never retested, (see Williams Aff. P 10), that a white assistant manager was disciplined for an incident similar to the one Mr. Odinkemelu had with Fabian, (see id. P 28, Ex. 18), and that it has no record of a complaint by Christy against any other assistant managers, (see id. P 17), a reasonable juror could accept Mr. Odinkemelu's evidence as demonstrative of pretext, thereby creating a genuine issue of material fact and preventing summary judgment.

VI.

For the foregoing reasons, CSC's Motion for Summary Judgment is DENIED as to Mr. Odinkemelu's claims for retaliatory discharge and discriminatory discharge and GRANTED as to any other claims.

This the 3rd day of April, 1998.

N. Carlton Tilley, Jr.
United States District Judge

ORDER

For the reasons stated in the Memorandum Opinion filed contemporarneously with this Order,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is DENIED as to Mr. Odinkemelu's claims for retaliatory discharge and discriminatory discharge and GRANTED as to any other claims.

This the 3rd day of April, 1998.

N. Carlton Tilley, Jr.
United States District Judge

APPENDIX E

[Filed October 1, 2001]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2448
CA-99-309-5-BR2

JAMES M. GIBBS, JR.;

Plaintiff - Appellant

v.

MORGANITE, INCORPORATED;

Defendant - Appellee

WIN STEPHENS, individually and in his official capacity; MON VONKCHALEE, individually and in his official capacity,

Defendants

and

DAVID COOPER, individually and in his official capacity; BRUCE MILLER, individually and in his official capacity; ROGER BONE, individually and in his official capacity; EDWIN ENNIS, individually and in his official capacity; DOUG BLIZZARD, individually and in his official capacity; LARRY WEST; RUSSELL LEE,

individually and in his official capacity; BERT JENKINS, individually and in his official capacity; PHILLIP BOWDEN, individually and in his official capacity

Defendants

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
FEB 7 2002

No. 01-979

IN THE

Supreme Court of the United States

JAMES M. GIBBS, JR.,

Petitioner,

v.

MORGANITE INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Morganite Incorporated* is a wholly owned subsidiary of Morgan Industries, Inc., which is a wholly owned subsidiary of The Morgan Crucible Company, PLC, a publicly traded corporation registered with the London Stock Exchange.

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* Morganite Incorporated is incorrectly identified as "Morganite, Inc." in the petition.

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COUNTER STATEMENT OF CASE

A. Procedural History.

Petitioner is a former employee of Morganite, filed this lawsuit on May 10, 1999, in the United States District Court for the Eastern District of North Carolina. The Complaint attempted to state claims against Morganite, Inc. and eleven individual employees of Morganite for (1) unlawful discriminatory termination on the basis of race under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981; (2) unlawful discrimination under the Americans with Disabilities Act of 1990; (3) unlawful discriminatory failure to promote on the basis of race and disability; (4) unlawful retaliatory termination; and (5) a racially hostile work environment. (*Id.*).

On June 1, 2000, Morganite filed a Motion for Summary Judgment with supporting materials.

On July 10, 2000 Petitioner filed a response in opposition to Morganite's Motion for Summary Judgment. Part of Petitioner's opposition was the Affidavit of James M. Gibbs, Jr., with attachments that included the transcript of a hearing held on September 19, 1997, before an appeals referee of the North Carolina Security Commission ("NCESC") regarding Petitioner's application for unemployment benefits. On July 19, 2000, Morganite filed a motion to strike certain portions of the Affidavit and to strike the transcript of the unemployment hearing.

On October 6, 2000, the district court entered a Judgment and Order granting Morganite's motion for summary judgment and granting the motion to strike (Pet. Petition App. pp. 4a-47a).

On July 30, 2001, the Court of Appeals issued an unpublished per curiam opinion affirming the district court's judgment "on the reasoning of the district court" (Pet. Petition App. pp. 1a-3a). Petitioner filed a petition for rehearing with the Court of Appeals. On October 1, 2001, the petition was denied.

B. Facts.

Morganite is a manufacturer of carbon and commutator products located in Dunn, North Carolina. Morganite hired Petitioner in March 1987 as a Tool and Die Maker, Grade C (JA 212).[1] Petitioner sharpened dyes and other tools using a bench grinder (JA 440). Petitioner remained a Tool and Die Maker, Grade C, throughout the remainder of his employment (JA 215). Petitioner has variously described his race as "Black" and as Native American (JA 437-441).

During the ten years that he worked for the Company, Petitioner was dissatisfied with virtually every aspect of his employment (JA 469-527). Petitioner frequently was belligerent, uncooperative and confrontational with his supervisors (JA 482, 486). Petitioner also frequently refused requests to work overtime or to work on unscheduled days (JA 474, 484). Petitioner viewed requests from his supervisors to work more quickly as "harassment" (JA 482). Petitioner called the Company's management "slave drivers" (JA 481).

---

1. Respondent believes the Petition contains numerous misstatements of important facts from the proceedings below. Accordingly, Respondent has attempted to cite to the record below in support of its factual assertions. References to the Joint Appendix filed with the Court of Appeals are designated as "JA" followed by a page reference. References to other materials filed with the Court of Appeals are designated by the record docket number in the Court of Appeals' docket.

Despite Petitioner's perceptions of unfair treatment and his poor attitude, his job performance evaluations remained steady and even improved near the end of his employment (JA 444-466, 531-532). Additionally, Petitioner received regular pay increases throughout his employment (JA 214-15).

Petitioner alleged that he had medical conditions related to his back and legs that amounted to "disabilities". He had surgery on the varicose veins in 1978, nine years before he became employed with Morganite (JA 168). Petitioner's medical records show that he never had any other significant complaints about the problems with his legs after 1978.

Petitioner had back surgery for herniated disk in May 1988. (JA 173). Petitioner's medical records show that he had no significant complaints of back problems again after 1988 (JA 383-435, 533, 544-83).

Despite his complaints about various aches and pains, Petitioner admitted that he was able to perform his job. Petitioner characterized his attendance during his last three years of employment as "excellent" (JA 179).

Petitioner claims that he asked management officials for reasonable accommodations for his medical conditions. He alleged that in February 1997, he presented a letter to Blizzard specifically requesting three accommodations (JA 203, 436). Petitioner admitted, however, that two of the three accommodations he requested were essentially unnecessary since the length of his shift remained 8 hours and because Morganite already provided rubber mats for employees to stand on while working (JA 204-207). Petitioner claimed that Morganite refused his third requested

accommodation; to split his long break into 2 or 3 shorter breaks. Petitioner admitted, however, that he had 3 daily breaks and that he could use them to sit or "do whatever [he] wanted to do" (JA 205).

Morganite disciplined Petitioner several times during his employment for confrontational, and at times, threatening behavior. The Company twice reprimanded Petitioner for refusing to work overtime (JA 474-77). In November 1990, Morganite reprimanded Petitioner for a confrontation with Bert Jenkins, Tool Room Supervisor (JA 918-921, 928).

In 1995, David Cooper, General Manager, reprimanded Petitioner for his behavior in a meeting with Roger Bone, Production Supervisor, and Russell Lee, Tool Room Supervisor (JA 489). In January 1996, Bone and Lee issued Petitioner a final counseling for threatening conduct Petitioner displayed during a meeting Bone held with Petitioner to discuss his 1995 performance review (JA 467, 708, 875-77). In conjunction with this counseling, Petitioner signed a written "Terms of Continued Employment" (JA 263-64, 468). The "Terms of Continued Employment" provided that Petitioner would not "use or imply any language, acts or behavior of a threatening or intimidating nature to any employee of Morganite" and provided that any such conduct would result in termination. On January 17, 1996, Petitioner signed the "Terms of Continued Employment" under protest (*Id.*).

On March 4, 1997, Mon Vonkchalee, a supervisor, met with Petitioner to give him a disciplinary counseling for being late to work on March 3 (JA 310-12, 516-17). During the meeting, Petitioner told Vonkchalee "I'm tired of this shit" and "I'm not signing any damn reprimand" (JA 312, 516).

Petitioner walked out of Vonkchalee's office (*Id.*). A short time later, Petitioner returned to Vonkchalee's office (JA 314-15). During this encounter, Petitioner asked Vonkchalee "am I the damned one, as usual?" and told him "the commutators supervisors don't seem to know a damn thing about leadership and moral conduct on the job, but they seem to know everything about the bottom line and how to screw someone." (JA 517). After Petitioner's second tirade, Vonkchalee crumpled up the written warning and threw it in the trash can (*Id.*; JA 795-98).

Vonkchalee reported the incidents to Roger Bone. Bone advised Vonkchalee to review the situation with Doug Blizzard, Director of Human Resources (JA 798, 801, 808). Vonkchalee discussed the incident with Blizzard (JA 698-700, 711).

On March 12, 1997, Vonkchalee met with Petitioner and gave him a second level disciplinary warning for being tardy on March 3, 1997 (JA 530). Shortly after the meeting, Petitioner confronted Vonkchalee about the warning (JA 521, 807-810, 852-56). Vonkchalee felt threatened by the encounter and reported it to Roger Bone and Doug Blizzard (JA 698, 699-701, 712, 823, 834-35, 842, 852-56). Bone and Blizzard decided to terminate Petitioner's employment (JA 697-700). On March 13, 1997, Morganite terminated Petitioner's employment for engaging in intimidating and threatening conduct towards management employees (JA 437). Petitioner admitted that Bone and Blizzard told him "that [he] was discharged for displaying intimidating and threatening behavior toward management employees" and for "violating the terms of a 1996 document referred to as: *Regarding Terms of Continued Employment.*" (JA 438,440).

Shortly after his termination, Petitioner filed charges of discrimination with the Equal Employment Opportunity Commission (JA 437, 438). In conjunction with the charges, Petitioner filed a sworn Affidavit (JA 439-441). In the Affidavit, Petitioner conceded that he believed the true reason for his termination was his "strong willed and outspoken" personality and not discriminatory bias (*Id.*).

Petitioner's theory in this lawsuit was that the alleged mistreatment he suffered was motivated by the Company's disapproval of his relationship with a white woman (JA 19, 233-36, 287-89, 332-33, 346). Petitioner alleges that sometime in May or early June 1987, David Cooper told him that employees at the plant disapproved of his relationship with a Caucasian woman (JA 470-71)[2] Petitioner claims Cooper told him to keep a low profile on the relationship, but that he disregarded Cooper's request (JA 470). The subject of Petitioner's girlfriend was never raised again by any Morganite official (JA 471-527). Despite this, Petitioner believed that "everything that happened to [him] went back to" his alleged conversation with Cooper (JA 233).

It is undisputed that David Cooper was not involved in the decision to terminate Petitioner (JA 607). Petitioner admitted he does not even know whether Roger Bone or Doug Blizzard knew his girlfriend's race, and he did not remember ever speaking to either of them about it (JA 373-75).

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2. Cooper vehemently denies that he had any such conversation with Petitioner (JA 615).

REASON FOR DENYING THE WRIT

I. THE FIRST QUESTION PRESENTED BY THE PETITION WAS NOT ADDRESSED BY THE COURT OF APPEALS.

Petitioner seeks review of the Court of Appeals' decision regarding his claims for retaliation (Pet. Petition p. 13). He apparently has not sought review of his claims for race and disability discrimination. Petitioner argues that the Court of Appeals imposed an improper burden on him at the pretext stage of its analysis by requiring him to prove that Morganite's employees did not feel threatened by his conduct (Pet. Petition p. 14). In deciding the retaliation claims, however, the district court never reached the stage of addressing whether Morganite's reason for terminating Petitioner was a pretext for unlawful retaliation (Pet. Petition App. pp. 26a-32a). Rather, the court held that Petitioner failed to establish a "causal link" between his alleged protected activity and Petitioner's discharge because: (a) Cooper's alleged statement occurred ten years prior to Petitioner's discharge, (b) Cooper was not involved in Petitioner's discharge, and (c) Petitioner's threats to report Morganite to the EEOC and NAACP started over five years prior to his discharge (*Id.*). Accordingly, the district court held that Petitioner failed to establish a prima facie case of retaliation, and it did not address Petitioner's evidence of pretext with regard to the retaliation claims (Pet. Petition App. p. 32a).

Additionally, Petitioner did not make the "improper burden" argument in the Court of Appeals with regard to his claims of retaliation (Brief of Appellant, pp. 37a-40a). Rather, Petitioner argued only that the district court erroneously concluded that he failed to establish a prima facie case of

retaliation (*Id.*). Since Petitioner failed to raise an argument regarding pretext in the Court of Appeals, and the Court of Appeals did not consider the issue, the issue is not properly before this Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in the court of appeals is not properly before us).

II. THE FIRST QUESTION PRESENTED BY THE PETITION DOES NOT RAISE A SUBSTANTIAL QUESTION WORTHY OF THIS COURT'S REVIEW.

The first question presented by the Petition in this matter amounts to nothing more than a request for this Court to conduct another de novo review of the district court's judgment. The first question does not present the type of issue that warrants review by the United States Supreme Court.

This Court rightfully exercises its discretion to review the matters brought before it only for compelling reasons. Rule 10 of the Rules of the Supreme Court of the United States provides guidance regarding the types of questions that might warrant the granting of a writ of certiorari. None of those types of questions are raised by the first question in the Petition. Rather, Petitioner seeks another review of the district court's order granting summary judgment. By way of example, Petitioner makes the following assertions regarding the types of issues on which he seeks review:

> Mr. Gibbs forecasted sufficient evidence to establish a prima facie case of retaliation under Title VII and [§] 1981 . . . (Pet. Petition p. 13).
>
> To reach this decision, the Court of Appeals permitted the district court to substitute its view of the weight of the evidence for the jury's view and failed to draw all reasonable inferences in Mr. Gibbs favor (Pet. Petition p. 15).
>
> The Court did not give sufficient weight to Mr. Gibbs' prima facie evidence and evidence of pretext, and it failed to draw all reasonable inferences in Mr. Gibbs' favor (Pet. Petition p. 19).

These statements show the true nature of the questions Petitioner raises in the Petition.

The district court properly stated the summary judgment standard in its decision (Pet. Petition App. pp. 17a-20a). Petitioner's real argument is that the district court engaged in fact finding and failed to view the facts in the light most favorable to him. This was the thrust of his argument to the Court of Appeals. His attempt to rehash that argument should not prompt this Court's review.

Petitioner also argues that the district court erred "by incorporating additional subjective standards to the Plaintiff's burden of proof" on his retaliation claims (Pet. Petition p. 13). As noted above, this argument is false and misleading. The district court dismissed the retaliation claims solely on the grounds that Petitioner failed to establish

a prima facie case (Pet. Petition App. pp. 26a-32a). The court did not reach nor consider the issue of Morganite's non-retaliatory reasons for its actions (*Id.*).

Rule 10 counsels that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." These are precisely the types of errors upon which Petitioner seeks review in his first question in the Petition. The Petition does not raise a substantial question that warrants this Court's review and should be denied.

III. THE COURT OF APPEALS DID NOT IMPOSE AN ADDITIONAL, UNFAIR BURDEN ON PETITIONER. RATHER, THE COURT HELD THAT PETITIONER FAILED TO PRODUCE EVIDENCE THAT CALLED INTO QUESTION MORGANITE'S LEGITIMATE, NON-DISCRIMINATORY REASONS FOR TERMINATING PETITIONER.

Although not properly presented by the Petition, Petitioner argues that the Court of Appeals by adopting the district court's reasoning, improperly required him to prove that Morganite's managers did not feel threatened by his conduct in order to raise an issue of pretext.[3] Even assuming, however, that the issue has been presented by the Petition, the Petitioner's assertion is incorrect.

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3. The district court engaged in the pretext analysis only in deciding Petitioner's claims for race discrimination. (Pet. Petition App. pp. 21 a-26 a). The district court did not reach the pretext issue in deciding Petitioner's retaliation claims, which apparently is the only portion of the district court's order challenged in the Petition (Pet. Petition p. 13).

The district court held that Petitioner failed to raise a genuine issue of fact regarding Morganite's explanation that it terminated Petitioner for engaging in threatening conduct. It did not find as fact that Petitioner made threats nor did it require Petitioner to prove that the employees did not feel threatened. The district court held:

> Although plaintiff may have made allegations in the course of these proceedings, which this court is bound to construe favorably toward him, that the allegations regarding his threatening and intimidating behavior were untrue, he has not presented evidence that Morganite's asserted belief in those allegations was unworthy of credence. Indeed, as evidenced by his affidavit, plaintiff suggests that he believes that the allegedly threatening behavior was actually the reason for his discharge. Accordingly, plaintiff has not begun to show that defendant's proffered reason for his discharge was pretextual as required by *St. Mary's* and *Reeves*, and his discriminatory discharge claim must fail.

(Pet. Petition App. pp. 25a-26a).

Significantly, Petitioner appears to concede that the district court properly analyzed the pretext question, stating in the Petition:

> Mr. Gibbs may demonstrate pretext by showing "either that a discriminatory reason more than likely motivated the employer's proffered explanation or . . . that the employer's proffered explanation is unworthy of credence." *Hardy v.*

> *S.F. Phosphates, LC.*, 185 F.3d 1076 (10th Cir. 1999). The pertinent question to determine pretext is not whether the employer was right to think the employee engaged in misconduct, but whether that belief was genuine or pretextual." *Id.* at 1080.

(Pet. Petition p. 22).

The district court's analysis of the pretext question was consistent with the existing precedent in the Fourth Circuit and other federal circuits. In a case alleging unlawful motivation, the critical issue is not whether Plaintiff in fact engaged in threatening conduct, but rather whether the decision makers had a good faith belief that he engaged in such conduct. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir.), *cert. denied*, 531 U.S. 875 (2000). The Fourth Circuit Court of Appeals has held "[a] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination." *Holder v. City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989) [*quoting Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987)]; *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Employers retain the right to make business decisions, even ill-advised ones, so long as they do not violate the law. *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 277 (4th Cir. 1995).

The Eleventh Circuit Court of Appeals' decision in *Elrod v. Sears & Roebuck*, is instructive on the burden of establishing pretext in this type of case. In *Elrod*, the plaintiff was discharged for sexually harassing a female employee. The plaintiff sued Sears alleging that he was discharged because of his age. At trial, plaintiff attempted to prove he

had not harassed anyone. In addressing the correctness of the company's proffered reasons for the plaintiff's discharge, the Court of Appeals stated that:

> Much of Elrod's proof at trial centered around whether Elrod was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for purposes of this opinion that the complaining employees interviewed by Rives were lying through their teeth. The inquiry of the ADEA is limited to whether [the management official who made the termination decision] believed that Elrod was guilty of harassment, and if so, whether his belief was the reason behind Elrod's discharge.

939 F.2d at 1470 (citations and footnote omitted).

Petitioner raised no genuine issue of fact that Bone and Blizzard did not honestly, and in good faith, rely on Vonkchalee's report that Petitioner had threatened Vonkchalee in deciding to terminate Petitioner. Petitioner admitted that Bone and Blizzard told him that he was being terminated for threatening behavior. The notes and documentation prepared by Vonkchalee and Blizzard at the time of the incidents in March 1997, reflect the threatening nature of Petitioner's conduct and the reasons for terminating him. Petitioner has offered no evidence that would call into question the legitimacy of Morganite's belief that Vonkchalee felt threatened and that it terminated Petitioner based on that belief. Accordingly, the Court of Appeals properly affirmed the district court's order and opinion dismissing Petitioner's claim for racially discriminatory termination, and the Petition should be denied.

IV. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S RULING THAT THE STATUTORY PRIVILEGE UNDER NORTH CAROLINA GENERAL STATUTE SECTION 96-4(t)(5) PRECLUDES THE INTRODUCTION OF TESTIMONY FROM PETITIONER'S EMPLOYMENT SECURITY COMMISSION HEARING.

In opposition to Morganite's motion for summary judgment, Petitioner sought to introduce testimony from an unemployment benefits hearing held before the North Carolina Employment Security Commission ("NCESC"). The district court adopted North Carolina's statutory privilege against the use of such testimony in any civil proceedings and struck the NCESC testimony. The Court of Appeals adopted the district court's reasoning and affirmed. Petitioner asserts that this holding was erroneous because it hampered Petitioner's ability to establish pretext in his Title VII claim.

Section 96-4(t)(5) of the North Carolina General Statute provides as follows:

> All letters, reports, communication, or any other matters, either oral or written, including any testimony at any hearing, from the employer or employee to each other or to the Commission or any of its agents, representatives, or employees, which letters, reports, or other communication shall have been written, sent, delivered, or made in connection with the requirements of the administration of [Chapter 96 of the North Carolina General Statutes], shall be absolutely privileged communication in any civil or criminal proceedings . . .

A federal court may adopt the state privilege as federal common law when no controlling federal law on that issue exists. *United States v. Cartledge*, 928 F.2d 93, 95-96 (4th Cir. 1991). No controlling federal law exists regarding the use of testimony from a state unemployment benefits hearing in a subsequent civil action for discrimination. *EEOC v. Illinois Dep't of Employment Sec.*, 995 F.2d 106, 107 (7th Cir. 1993). In deciding whether to adopt North Carolina's statutory privilege, the district court was required to balance the important state interests behind the privilege against the countervailing federal interests. *Cartledge*, 928 F.2d at 96; *Hartsell v. Duplex Products, Inc.*, 895 F. Supp. 100, 102-03 (W.D.N.C. 1995), *aff'd*, 123 F.3d 766 (4th Cir. 1997).

The Court of Appeals affirmed the district court's ruling that the important state interests advanced by North Carolina's privilege outweighed the competing federal interests in this case. The district court correctly noted that the privilege encourages full disclosure from claimants and employers and prevents parties from conducting free discovery before litigation. *See Hartsell*, 895 F. Supp. at 103 ("ESC hearings do not investigate Title VII allegations, and ESC participants do not expect their testimony to appear later in a subsequent federal Title VII proceeding").

Contrary to Petitioner's assertion, the fact that Petitioner had already initiated his Title VII proceedings by the time the NCESC hearing was held does not change the parties' expectations. An NCESC hearing is held solely to resolve the question of whether an individual's employment was terminated for "misconduct," "substantial fault" or "without good cause attributable to the employer" as those terms are defined in North Carolina's statute. N.C. Gen. Stat.

§§ 96-14(1), (2), and (2)(a). The hearings are not required to "conform to common law or statutory rules of evidence or technical or formal rules of procedure." N.C. Gen. Stat. § 96-15(c). Issues and allegations peculiar to federal employment discrimination laws are not investigated, evaluated, or discussed in NCESC hearings. The witnesses in the NCESC hearing had an expectation of privilege precisely because of the prohibitions contained in N.C.G.S. § 96-(4)(t)(5) against the use of that testimony in a subsequent lawsuit. The primary purpose of the privilege is to encourage full disclosure in a contested unemployment proceeding without fear that something may later be used against you in a civil or criminal action. The statutory privilege is aimed in part at preventing the hearings from becoming full-blown mini-trials on unrelated civil claims with the consequent increases in time and expense to the parties and the certain erosion of the privilege altogether.

In contrast to the important state interests advanced by the privilege, the competing federal interest is not harmed by the adoption of the state privilege in federal court. The district court agreed that the federal government had an irrefutable interest in enforcing its anti-discrimination laws and the absence of a federal privilege comparable to the state privilege effectively promotes the disclosure of probative evidence in a Title VII suit. Nevertheless, the district court properly adopted the state privilege in Petitioner's case because the probative value of the evidence Petitioner sought to introduce was very limited. Petitioner deposed the witnesses who testified at the unemployment hearing and had access to his own deposition testimony as well. The district court properly concluded that the NCESC testimony Petitioner sought to rely on was duplicative of the extensive deposition testimony taken and that there was no need to

abrogate the state's statutory privilege for such a limited purpose. As the court in *Hartsell* noted, "[t]he desire to impeach witnesses does not outweigh the state interest in protecting confidential unemployment proceedings." *Hartsell*, 895 F. Supp. at 102.

Finally, Petitioner's due process is not compromised by adopting the important state privilege and precluding Petitioner from introducing the NCESC testimony. As stated above, Petitioner deposed the witnesses who testified at the NCESC hearing and had ample opportunity to uncover impeachment evidence. Petitioner himself contends that "there exists sufficient evidence in the depositions to support each claim that is being pursued by [Petitioner]. . . ." (Pet. Petition p. 29). Consequently, the district court did not violate Petitioner's right of due process and did not abuse its discretion by striking the NCESC testimony.

The Court of Appeals correctly affirmed the district court's ruling on the issue of the state privilege, and that decision does not warrant review by this Court.

IV. THE STRICKEN NCESC TESTIMONY WAS NOT INCONSISTENT WITH DEPOSITION TESTIMONY.

Even if the NCESC testimony was improperly stricken by the court, it made no difference in the result of the case. The testimony offered by the Morganite officials at the NCESC hearing was completely consistent both with the reason given Petitioner for his termination and the testimony of the same officials in their depositions. The NCESC testimony would not have aided Petitioner in establishing pretext.

Petitioner admitted that he was told he was terminated "for violating the terms of a 1996 document" by "displaying intimidating and threatening behavior toward management employees" (JA 438, 440).

Blizzard and Vonkchalee testified for Morganite at the NCESC hearing. Blizzard testified at the hearing as follows:

> A: "[Gibbs] was terminated by Roger Bone, our plant manager on March 13, 1997 for violating that written agreement that was signed basically the year before that . . .
>
> Q: And again, on March 13, 1997, when he was let go for the alleged violation of this agreement he signed, to whom were those comments supposedly spoken?
>
> A: Mr. [Mon] Vonkchalee.

(JA 942, 952). This testimony was consistent with Blizzard's deposition testimony in this case and Blizzard's contemporaneous notes made in March 1997 (JA 698-99, 711, 712). Blizzard testified in his deposition as follows:

> Q: Do you recall what he was terminated for?
>
> A: For making threatening comments towards Mon [Vonkachalee]–toward the supervisor.

(JA 698).

In the NCESC hearing, Vonkchalee presented a detailed account of the threatening conduct that led to Petitioner's discharge (JA 956-67). Vonkchalee testified that he felt threatened and reported the threats to Bone and Blizzard (JA 960, 962-63, 965-66). Vonkchalee's testimony in the NCESC hearing was identical to his deposition testimony and his written notes made in March 1997 (JA 794-812, 852-56).

Accordingly, even if it had not been struck by the district court, the NCESC testimony would not have aided Plaintiff and would not have changed the result in this case. The Petition should be denied.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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